ad the answer

A TREATISE

ON THE

PRACTICE

OF THE

HIGH COURT OF CHANCERY,

WITH SOME

PRACTICAL OBSERVATIONS

ON

The Pleadings in that Court.

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IN TWO VOLUMES,

VOL. II.—PART I.

LONDON:

J. & W. T. CLARKE,

LAW BOOKSELLERS AND PUBLISHERS,

PORTUGAL-STREET, LINCOLN'S-INN.

1838.



D IDSON, PRINTER,
SKRLE LACE, CAREY STREET.

ADVERTISEMENT.

The Author regrets to announce, that he has found it impossible, without materially interfering with the plan of the treatise, to complete it within the limits which he originally proposed, and that he has been obliged to extend it to a third volume, which will be published as speedily as possible.

He avails himself of the present opportunity, to notice an inaccuracy, which has inadvertently crept into a passage in a former part of this work, and to which his attention has been drawn by a note of Mr. Cooper's, in the last number of his reports, (C. P. Cooper's Reports, part III. p. 460.) The inaccuracy alluded to, will be found in the first volume of the present treatise, (p. 539,) and consists in a miscalculation of the time allowed to a plaintiff under the New Orders to except to an answer and to procure an order to amend. The passage in which it occurs, was introduced for the purpose of explaining the grounds upon which the 26th Order of December, 1833, was founded; and the mistake consists in the Author having assumed, that the difficulty which the above order was intended to obviate, would arise in a case in which the answer should be *filed* on the 30th of November. (*Vide* ante, vol. 1, p. 539.) Whereas the case assumed, ought to have been one in which the answer, would, under the 4th Order of 1828, be *deemed complete* on the 30th of November, in which case, the difficulty intended to be obviated would have arisen, (which the Author admits would not have been the case, as Mr. Cooper has clearly pointed out, had the answer

been *filed* on that day.) If the answer had been filed so as to be *deemed complete* on the 30th of November, in that case, under the Orders as they stood prior to December, 1833, the plaintiff would, supposing no vacation had intervened, have had till the 1st day of Hilary Term following, for filing his exceptions; but as a vacation would have intervened of, say, three weeks, those three weeks would, under the 19th Order, as amended in 1830, have been added to the time allowed for excepting, which, by that means, would have been prolonged to the 1st of February. In the meantime, however, the defendant under the 13th Order, of 1828, would have been in a situation to move to dismiss the Bill on the 25th of January, *i. e.*, a week before the time allowed the plaintiff by the 4th Order, for delivering exceptions had elapsed, which the Author apprehends was one of the difficulties which the 26th Order, of 1833, was intended to remedy.

The Author begs also to acknowledge the justice of Mr. Cooper's observation, with regard to *Swinfen* v. *Swinfen*, 3 Sim. 384, (cited vol. 1, p. 539,) and that the difficulty, in that case, did not arise under the amended Orders of 1828, but under the original Orders, as they stood prior to such amendments.

LINCOLN'S INN,
February 22, 1840.

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CHAP. X.

OF THE DEFENCE TO A SUIT.

Course of proceeding on the part of the defendant.

IN the preceding chapters the attention of the reader has been principally directed to the case on the part of the plaintiff, the method of submitting it to the Court, and the means provided by the practice of the Court for compelling the defendant to submit himself to its jurisdiction; or, in case of his refusal, of depriving him of the benefit of his contumacy by giving to the plaintiff the relief to which the justice of his case appears to entitle him. I shall now proceed to consider the line of conduct to be pursued by a defendant who is willing to submit himself to the authority of the Court, and to abide its decision upon the matter in litigation.

Employment of a Solicitor.

The first step to be taken by a defendant who intends to defend the suit, after he has been served with the subpœna, is to employ a solicitor to appear for him. The employment of a solicitor, for that purpose, is not absolutely necessary, as he may apply immediately to a Clerk in Court or Waiting Clerk to enter an appearance for him. It is usual, however, to employ a Solicitor; and it is to be observed, that a special authority is not necessary to enable a Solicitor to undertake the business, and that he may do so under a general authority to act as Solicitor for his client (*a*); a Solicitor, however, ought not to take upon himself to appear for a defendant without some authority, and where one without any instruction had caused an appearance to be entered for an infant defendant, the appearance was ordered to be set aside, and the Solicitor to pay the costs (*b*).

Special authority not necessary.

(*a*) Wright *v.* Castle, 3 Mer. 12. Ante, vol. 1, 403.

(*b*) Richards *v.* Dadley, Rolls. Sittings after Trin. Term, 1837.

Different sorts of Defence.

The defendant having appeared to the subpœna and taken a copy of the Bill, the next point for consideration in the ordinary course of the cause is, the nature of the defence to be put in.

It is to be recollected, that it forms part of the prayer of every Bill filed for relief in this Court, (except those which are merely filed for the purpose of obtaining a *certiorari* to remove a cause from an inferior jurisdiction,) that a *subpœna* may issue directed to the defendants, commanding them at a certain day personally to appear before the Court; *and then and there full, true, direct, and perfect answer make to all and singular the premises;* and further, to stand to, perform, and abide such further order, direction, or decree therein as to the Court shall seem meet (*d*); so that the first thing which a defendant is required to do after appearance, is to answer the Bill. It may, however, happen from some cause, either apparent upon the face of the Bill itself, or capable of being concisely submitted to the Court that the plaintiff is not entitled to the relief which he has prayed; or if he is entitled to the assistance of the Court, he may not be entitled to relief upon all the points upon which he claims it; in such cases the defendant may, if his objection goes to the whole relief, submit the grounds upon which he considers the plaintiff not entitled to what he seeks, in a concise form to the Court, and pray the judgment of the Court whether he is bound, under the circumstances, to put in any further or other answer to the Bill; or, if he objects to part only of the relief, he may answer that portion only of the Bill which is material to the relief which he does not object to, and submit to the judgment of the Court whether he is bound to answer the rest. This species of defence, if the objection appears upon the face of the Bill itself, is made by *demurrer;* but if it depends upon any matter *not* in the Bill, it must be submitted to the Court in the form of a *plea.* If the defence submitted to the Court in either of the above forms is admitted, or held upon argument to be good, the effect of it, if it be a demurrer, is to put the Bill, or, that part of it which has been demurred to, out of Court; or, if it be a plea, to limit the matter in dispute to the question, whether the point raised by it be true or not; in which case, if the de-

By Demurrer or Plea.

To the whole Bill.

Or only to part.

(*d*) Ante, vol. 1, p. 500.

Different sorts of Defence.

fendant succeeds in establishing the point raised by the plea by evidence at the hearing, the Bill, so far as it is covered by the plea, will be dismissed. If the demurrer or plea be held upon argument to be bad, the effect of the judgment of the Court, in general, is that the defendant must put in an answer to the Bill; he may, however, if his first defence has been by demurrer, be admitted, under certain circumstances, to dispute the right of the plaintiff to call upon him for an answer, by means of a plea; or he may still submit reasons why he should not be called upon to answer the whole of the Bill by demurring or pleading to a portion of it only. If the defendant has no reasons of the above nature to offer why he should not be called upon to answer the plaintiff's Bill, or if, having offered any such reasons, they are overruled, the course of the Court requires that he should put in a full *answer* to the Bill (*e*), unless, indeed, being a case in which the relief claimed by the plaintiff, would, if granted, be beneficial to himself, he thinks proper to relinquish the benefit he might derive from it, which he can do by putting in a species of answer called *a Disclaimer*, by which he disclaims all interest in the matters in question in the suit.

By Answe

Or Disclaimer.

In the ensuing chapter, the several methods of defence above alluded to will be discussed, and the reader's attention will be drawn to the practice relating, 1st, to Demurrers; 2ndly, to Pleas; 3rdly, to Disclaimers, 4thly, to Answers; and, lastly, as all or any of the matters above pointed out, may in certain cases be joined in a defence to one Bill, the practice arising from such a combination of defences will be discussed. But before we proceed to the different modes of defence, it will be right to consider the practice of the Court with regard to entering appearances.

(*e*) Previously to putting in his answer, however, the defendant has a right to have all impertinent matter, which may be in a bil', expunged. Ante, vol. 1, 459.

CHAP. XI.

OF APPEARANCE.

SECT. I.—*Of Appearance in general.*

Object of Appearing.

APPEARANCE is the process by which a person against whom a Bill has been filed submits himself to the jurisdiction of the Court. And it is to be observed that it is in all cases necessary, in order to give to the Court cognizance of the matter in dispute, that the defendant should *appear*. This rule has been adopted from the ancient Civil Law, according to which no decree could be had against an absent person, against whom process had been issued, but who could not be brought in to appear (*a*); and it was so strictly observed, that, till the stat. 5 Geo. 2, c. 25 (*b*), a decree *pro confesso* could not be made against a defendant, for whom no appearance had been entered. That statute first empowered the Court, in the case of a defendant absconding to avoid its process, to order the Bill to be taken *pro confesso*, against such defendant, although no appearance had been entered for him (*c*), and as its provisions, as we have seen, are still in force under the 1 W. 4, c. 36, ss. 3 & *seq.*, a Bill may still, in the cases to which that statute applies, be taken *pro confesso* against a defendant, without a previous appearance being entered for him.

Necessary in all cases.

Except where the defendant absconds.

Different sorts of Appearances.

Appearances are either *voluntary* or *compulsory* (*d*). Voluntary when the defendant comes in upon the return of the *subpœna*; *compulsory* where the appearance is the consequence of any of the processes of contempt before mentioned.

With the Registrar.

There is also another species of appearance, viz. *Appearance with the Registrar*. This has been before alluded to, and differs from an ordinary appearance, which is only entered with the Clerk in Court, in being entered upon the records of the Court (*e*).

(*a*) Gilb. Evid. Rom. 36.
(*b*) Repealed and re-enacted by 1 W. 4, c. 36, ante, vol. 1, 270.
(*c*) Ante, vol. 1, p. 270.
(*d*) 1 Harr. 112.
(*e*) For. Rom. 82.

Gratis.

A defendant may also appear *gratis*, which takes place where he does so before he has been served with a *subpœna*.

Place where Appearances are entered.

The place at which appearances are entered, as stated in the memorandum at the top of the writ, is "*at the Six Clerks' Office in Chancery Lane.*" This memorandum is affixed for the purpose of apprising the party upon whom the writ is served of the place to which he is to go, in case he is desirous of appearing without the intervention of a solicitor. In general, however, the defendant, upon being served with the *subpœna*, employs a Solicitor of the Court to take the necessary steps on his behalf; but whether he employs a Solicitor or not, a Clerk in Court or a Waiting Clerk must be retained to appear for him.

By Husband and Wife.

In general, where a Husband and Wife are served with a *subpœna*, a separate appearance by the Wife will be irregular; the Husband should appear for both, and if he omits to do so, an attachment may go against both (*f*). And therefore, where a Bill was filed against a Husband and Wife, and the Husband only appeared for himself, and put in a demurrer in their joint names, an attachment was issued against both for the non-appearance of the Wife (*g*). And so where a Husband is served without the Wife, he must, if he have notice that his Wife is also a defendant, appear for both; but in that case the attachment will go against him alone (*h*).

In what cases Wife may appear alone.

But although a Wife cannot, in general, appear by herself, there are, as we have seen, cases in which the Court will permit a *subpœna* to be served upon her alone, as where a Bill is brought against a Husband and Wife for a demand out of the Wife's separate estate and the Husband is abroad (*i*); in such cases, she must appear by herself, otherwise she may be attached: and even where the subject matter of the suit did not relate to the separate estate of the Wife, and the Wife, having been served, appeared (the husband being abroad) and prayed time to answer separately, the Court held, that the irregularity of the service had been waived, and that she could not be discharged from the effect of her appearance (*k*).

(*f*) Prac. Reg. 37.
(*g*) Cary, 92.
(*h*) Prac. Reg. 37.
(*i*) Ante, vol. 1, 217.
(*k*) Travers v. Buckly, 1 Ves. 384.

By Infant.

An Infant must appear by his Guardian *ad litem,* the method of whose appointment has been before pointed out (*l*).

By Idiots and Lunatics.

Idiots and Lunatics also appear by their Guardians who are generally their Committees (*m*), unless the interests of such Committees are adverse, in which case another person must be appointed (*n*). The mode of appointing a Guardian to appear for a person of weak intellect has been before noticed (*o*).

Sect. II.—*Of Voluntary Appearance.*

What.

Voluntary appearance is where the defendant, having been served with the *subpœna,* obeys its injunction either upon or before the day of its return. We have seen before, that, in a town cause, (that is, where the defendant resides in London or within twenty miles of it,) the day of return is *four* days after service of the subpœna, exclusive of the day of service. In a country cause, (that is, where the defendant lives more than twenty miles from London,) the day of return is *eight* days after service, exclusive of the day of service (*a*).

In a Town Cause.

In a Country Cause.

In what manner made with Clerk in Court.

The usual course for a defendant who intends to appear is, either personally or by his Solicitor, to retain a Clerk in Court or Waiting Clerk to appear for him. The Clerk in Court, upon being retained, has recourse to the Bill-book (*b*), in order to ascertain whether any Bill has been filed; which being done, he gives to the plaintiff's Clerk in Court a written notice of the defendant's appearance (*c*), and also enters the appearance in his own memorandum-book (*d*). This species of appearance is called *an appearance with the Clerk in Court,* in order to distinguish it from *an appearance with the Registrar,* the mode of entering which will be presently explained.

From what time dated. Office Copy Bill.

The appearance is dated from the date of the written notice to the plaintiff's Clerk in Court. When the appearance has been entered, the defendant's Clerk goes to the office of the Six

(*l*) Ante, vol. 1, p. 230.
(*m*) Ib. 219.
(*n*) Ib. 220.
(*o*) Ib. 248.

(*a*) Ante, vol 1, p. 556.
(*b*) Ib. 507, 580.
(*c*) 1 Smith, 102; 1 Newl. 108.
(*d*) Hind. 94.

Clerk who filed the Bill, and there takes it from the file for the purpose of having it copied, at the same time leaving a note and entering the name or title in his own book (*e*). If the Bill happens to be in the hands of the Clerk in Court of another defendant, who has already appeared, application for the Bill must be made to him instead of the Six Clerk (*f*).

How entered.

Where Bill in the hands of Clerk in Court for another defendant.

By the Order of the 21st Dec. 1833, (Ord. xxxi.) office copies of Bills are to contain only one folio, consisting of ninety words in every page, and to be reckoned, as to Schedules, acding to the manner directed by the General Order of the 28th Nov. 1743, viz., they are to be written in three columns, the first or outer column and the third or last column whereof are to contain respectively the dates and sums in figures, as they are respectively written in the engrossment of such Schedules, and the middle columns to contain four words in a line of the facts or matters charged in such accounts or inventories (*g*).

What number of words it must contain. In the Schedule.

It seems that every defendant (or set of defendants, where more than one appears by the same Clerk in Court at the same time,) is bound to take an office copy of the Bill, unless he is a person entitled to the privilege of peerage, and has been served with a copy of the Bill at the same time that he was served with the letter missive in the manner before pointed out, in which case he is not obliged to take or pay for any other copy of the Bill (*h*). The statute 1 W. 4, c. 36, s. 15, rule 14, also provides, that where a defendant is in custody for a contempt in not appearing, and shall be able to put in his answer by borrowing or obtaining a copy of the Bill without taking an office copy, he shall not be compellable to take any such copy; but the Clerk in Court may, (if he thinks the defendant is of sufficient ability to pay for an office copy,) require him to make an affidavit denying his ability, in consequence of poverty, to pay for an office copy of the Bill (*i*).

Must be taken by every defendant or set of defendants appearing by same Clerk in Court. Secus where defendant is a peer,

or is too poor to pay for it, and can borrow one.

With respect to appearances to amended Bills, it is stated that if the amendment is made before answer, no new appearance is necessary (*k*); nor will any be required even where

To amended Bill.

(*e*) Hind. 94.

(*f*) Ib.

(*g*) Beames's Orders, 395.

(*h*) Ante, vol. 1, 555; Beames's Orders, 395.

(*i*) Ante, vol. 1, 671.

(*k*) 1 Smith, 159. 2nd. ed. *Sed quære?* whether a defendant ought not, in order to entitle himself to the time allowed him by the New Or-

How entered.

the amendment has been made after answer, unless the defendant or his Clerk in Court shall be served with a *subpœna* to answer the amended Bill, in which case the form of the *subpœna* requires an appearance to be entered within the time limited by the writ. A plaintiff, however, cannot enforce an appearance till he has paid or tendered the costs of amendment (*l*).

Proceeding where no Bill has been filed.

It has been stated above, that the first thing which the defendant's Clerk in Court does, after he has been retained to enter an appearance for the defendant, is to have recourse to the Bill-book, in order to ascertain whether any Bill has been filed. This he may do as well before as after the return of the *subpœna*; and if, upon searching the book, it appears that no Bill is on the file, he does not enter any appearance, (for the plaintiff cannot, in such cases, issue an attachment, it having, as we have seen, been decided, that an attachment issued without an entry of the Bill in the Bill-book (*m*) is irregular;) but he makes an entry of the title of the cause and of his having applied to appear in another book, which has been before referred to (*n*). The rule is the same in the case of amended bills (*nn*).

The object of making this entry is to prevent the Bill, when it comes in, from being antedated; for it is to be recollected, that by the 4th Ann. c. 16, it is enacted, that no *subpœna* or other process for appearance shall issue till after the Bill has been filed with the proper officer, except in cases of Bills for injunctions to stay waste or to stay suits at law commenced (*o*); and the effect of it is to compel the plaintiff's Clerk in Court, (who is bound to search the book,) to give notice to the defendant's Clerk in Court, of his having filed the Bill (*p*).

Of preferring Costs.

When the defendant's Clerk in Court has ascertained that no Bill has been filed, he may, if he please, "*prefer costs*" against the plaintiff; that is, he may take steps to compel the plaintiff to pay the defendant the costs he has incurred by being improperly served with the *subpœna*.

ders, to *demur* or to plead, answer or demur, (not demurring alone,) to appear *gratis* to the amended Bill?

(*l*) 1 Smith, 2nd ed. 159.

(*m*) Ante, vol. 1, 580.

(*n*) Ante, vol. 1, 580 n. Vide etiam Cha. Rep. Appx. B. No. 25, p. 553.

(*nn*) Ante, vol. 1, p. 581.

(*o*) Ante, v. 1. 563. The antedating of Bills is also provided against. Lord Clarendon's Orders, ante, 568.

(*p*) Cha. Rep. Appx. B. 25, 553.

In order to do this, he must wait till the day after the return day of the subpœna; for, as the statute of Ann permits a *subpœna* to be issued in injunction cases before the Bill is filed, it would be impossible, till the Bill is filed, to ascertain whether it pray an injunction or not; and as the plaintiff has, (as we have seen,) the whole of the day of the return to file his Bill (*q*), it might be useless to commence any proceedings with regard to costs at an earlier period.

Of preferring Costs.

The method of preferring costs is as follows, (viz.,) when a subpœna has been served, and no bill has been filed, the defendant's Clerk in Court writes a note in the House-book—"Enter costs of A. against B.," and leaves a notice of a similar nature with the porter of the Six Clerks' Office or in the hall below the office, where the Costs-book is kept, and the Six Clerk then enters it in the book; which being done, and the line struck, the Clerk in Court makes out a Bill of Costs, and carries it before one of the Masters, who taxes it, and sets his name to it. In a town cause these costs are taxed at £1 6*s.* 8*d.*, and in a country cause at £1 13*s.* 4*d.* The Bill is then carried to the Registrar to be entered, for which 1*s.* 4*d.* is paid. A *subpœna* for the costs must then be obtained, and served in the usual manner (*r*); and if, upon service and demand, the defendant refuse to pay them, an affidavit of the service, demand, and refusal must be left with the defendant's Clerk in Court, who will make out an attachment against the plaintiff (*s*). After the attachment sued out, the plaintiff will not be permitted to file his Bill till after the costs have been paid; but if the Bill be already on the file, the plaintiff may move to retain it upon payment to the defendant of the costs out of purse (*t*).

Method of proceeding.

It is to be observed, that, by preferring costs, the defendant will not relieve himself from appearing when the Bill is filed; and, in fact, so little is gained by the proceeding, that the practice has become obsolete (*u*), it being generally considered most advantageous for the defendant, when he has been improperly served with a subpœna before the filing of the Bill, to wait till

Practice has become obsolete.

Modern practice where no Bill has been filed.

(*q*) Ante, vol 1, 569.
(*r*) Vide post, "Costs."
(*s*) Hind. 96.
(*t*) Hind. 96.
(*u*) Cha. Rep. Appx. B. 25, p. 555.

Preferring Costs.

the attachment has been issued against him, and then to move to set the process aside for irregularity, having previously taken the necessary precaution, by the entry in the book before alluded to (*a*), to prevent the Bill from being antedated. The effect of such a proceeding is to oblige the plaintiff to sue out and serve a fresh *subpœna.* The defendant, however, who intends to avail himself of it must be careful not to appear to the *subpœna,* which will have the effect of waiving the irregularity; but he must wait till an attachment has been issued, and then move to set it aside, having previously entered his appearance with the Registrar.

Sect. III.—*Compulsory Appearance.*

In what cases appearance is said to be compulsory.

Compulsory appearance is where the defendant is taken and ***brought in*** upon an attachment, proclamation, commission of rebellion, or by the Serjeant-at-Arms, and is thereby compelled either to enter an appearance for himself or to submit to have one entered for him by a Clerk in Court, appointed by the Court for that express purpose. Compulsory appearance may, therefore, be divided into personal and substituted.

In what case it may be personally entered.

A defendant who is brought up in actual custody, upon any of the processes above referred to, cannot enter his appearance with the Clerk in Court in the same manner as a person who appears voluntarily; but he must enter his appearance ***with the Registrar*** (*b*); the manner of doing which will be pointed out in the following section.

This rule, however, does not apply to defendants who have been admitted to bail: such defendants may enter their appearance with the Clerk in Court in the same manner as parties who come in voluntarily upon the *subpœna.* If, however, they omit to do so before the return of the process upon which they have been arrested, the messenger will be sent to bring them into Court, in which case they will be in the same situation as

(*a*) Ante, vol. 2, p. 8. (*b*) 1 Har. 112.

Personal.

any other defendants arrested and brought up in actual custody (*b*).

By Clerk in Court where defendant is arrested in the country.

It is to be observed that if a defendant be arrested in the country at some distance, where he cannot procure bail, and is unwilling to incur the expense of being brought up to London, he may obtain an order, upon motion or petition, that he may enter his appearance with the Registrar by his Clerk in Court, upon obtaining which, and a certificate by the Registrar, indorsed upon the order, of having entered his appearance, and payment or tender of the costs (*c*), the plaintiff's Clerk in Court will discharge him from his arrest as a matter of course; or, if he refuses so to do, the Court will, upon application by motion or petition, order his discharge (*d*).

After appearance with the Register, if answer is not put in in due time, the Serjeant at Arms may be sent.

After a defendant has entered his appearance with the Registrar he must be careful to put in his answer within the time limited by the rules of the Court, or to obtain an extension of the time by application to the Master in rotation, pursuant to the 3 and 4 W. 4, c. 94, s. 13., and the new orders made thereupon, otherwise the plaintiff may without any intermediate process obtain an order for a Serjeant-at-Arms to apprehend him for his contempt.

Where defendant in contempt, time between the return of the subpœna and actual appearance to be deducted from the time for answering.

And it is to be noticed that by the 12th of Lord Brougham's Orders it is provided, that where a defendant is in contempt to an attachment for want of appearance, the interval between the day fixed by the *subpœna* for appearance, and that on which the same is actually entered, is to be deducted from the time usually allowed to the defendant to plead, answer, or demur, (not demurring alone,) to the plaintiff's Bill (*e*).

Substituted appearance,

Substituted appearance is where a party having been taken and committed to prison upon process of contempt for not appearing, and refuses or omits to enter his appearance with the Registrar, the plaintiff proceeds to have an appearance entered for him, under the 1st W. 4, c. 36, s. 11, by which it is enacted that if any defendant, by virtue of any writ of *habeas*

in what cases entered.

(*b*) 1 Har. 112. The plaintiff may also procure an assignment of the bail-bond from the Sheriff, and commence an action upon it, ante, vol. 1, p. 587.

(*c*) 1 Har. 113.

(*d*) Hind. 145.

(*e*) Ord. 1833, xii.

Substituted.

corpus, or other process issuing out of any Court of Equity, shall be brought into Court, and shall refuse or neglect, or being within the walls of any prison in England, under or charged with an attachment, or other process of contempt, shall, after fourteen days' previous notice in writing, requiring him to enter an appearance, refuse or neglect to enter his appearance according to the rules or method required by the said Court, or to appoint a Clerk in Court, or Attorney of such Court, to act on his behalf, such Court may appoint a Clerk in Court, or Attorney of such Court, to enter an appearance for such defendant, and such proceedings may thereupon be had in the cause as if the party had actually appeared. The course of proceeding to enter a substituted appearance under this section, where the plaintiff intends to take the bill *pro confesso*, against the defendant under the Act, has been before pointed out (*f*).

Where plaintiff wishes to take Bill pro confesso.

Where plaintiff entitled to privilege of Parliament.

Another case in which substituted appearance may be resorted to, is where the defendant is entitled to Privilege of Parliament, and stands out the process to enforce appearance to the return of the Sequestration, in which event the Court is empowered, by the 1 W. 4, c. 36, s. 12, to appoint a Clerk in Court to enter an appearance against such defendant (*g*).

Where party is resident abroad.

It is to be observed that, in the above cases, the Court is only authorized to order a substituted appearance to be entered where the defendant is in actual contempt, a process having been actually issued against him; but that, in the case of Bills filed against persons resident abroad, which come within the description required by the 2 and 3 W. 4, c. 33, the Court is authorized to order an appearance to be entered for the defendant, upon the defendant's omission to appear at the return of the *subpœna*, the Court having been previously satisfied of the due service of the writ by affidavit (*h*). It is to be noticed that the 2 & 3 W. 4, c. 33, does not, as the other statutes (by which substituted appearances have been authorized,) have

(*f*) Ante, vol. 1, p. 688.
(*g*) Ante, vol. 1, p. 654.
(*h*) Ante, vol 1, p. 281.

done, direct the Court to appoint a Clerk in Court for the purpose of entering an appearance for a defendant abroad, but the practice of the Court is to do so (*i*).

Substituted Appearance.

Sect. IV.—*Of Appearance with the Registrar.*

Nature of the Appearance.

An appearance with the Registrar is an appearance upon the Records of the Court, and is different from an appearance in the Office by a Clerk in Court; for an appearance with the Clerk in Court, is only a foundation upon which to issue process; and there is no record of such appearance, (it being, as we have seen, merely effected by the defendant's Clerk in Court giving notice to the Clerk in Court for the plaintiff, that the defendant appears,) but when a defendant enters his appearance with the Registrar and does not afterwards answer, 'it is a departure in despite of the Court, upon which the Court may order an immediate commitment, since this is not merely a contempt of the process but of the Court itself' (*k*).

In what cases entered.

Ordinary contempt.

The practice of entering an appearance with the Registrar has been frequently alluded to in the course of this treatise, and it will be seen that, besides being the proper mode of appearance in the cases mentioned in the last section, where a party who is brought up or detained in prison upon a process of contempt, is willing to submit himself to the jurisdiction, it is the course to be adopted in all cases where a party being in contempt for non-appearance, pursuant to the *subpœna*, is desirous of setting aside the process which has been issued against him, either for irregularity in the process, or in the subpœna upon which it is founded, or in the service of that writ (*l*).

Extraordinary contempt.

In cases also of extraordinary contempt, where the contempt is by beating or abusing the person serving the process of the Court, the party is frequently ordered to enter his ap-

(*i*) Harrison v. Hunt, Reg. Lib. A. 1835. 764.

(*k*) For. Rom. 83.

(*l*) Ante, vol. 1, 565, 667.

In what cases.

Where party applies for a special indulgence.

pearance with the Registrar, and to be examined upon interrogatories(*m*); and in some cases, where a party applies for the special indulgence of the Court, such as further time for putting in his answer, his application is complied with only upon the condition of his entering his appearance with the Registrar. This practice has been confirmed by the Order of the 21st December, 1833, Ord. xxi. (*n*).

Effect of it.

Where party does not answer in due time, &c.

By entering an appearance with the Registrar, the party, as we have seen, stands in a different position from what he does when he enters it with a Clerk in Court in the ordinary way; for in that case, if he does not answer within the proper time, he cannot be compelled to do so without recourse being had to process of contempt; but where he enters it with the Registrar, he appears as being in contempt, and if he does not put in his answer within the time limited, he may be committed to prison without further process (*o*). It seems that, formerly, the committal to the Fleet in such cases was ordered upon motion of course, the effect of which was, that the Warden of the Fleet or his deputy was the officer to take the party into custody, and that upon his return of *non est inventus* a sequestration was issued. Complaint, however, having been made of this practice by the Serjeant at Arms, as tending to interfere with the profits of his place, the Order of the 13th of May, 1721, before referred to (*p*), was made, whereby it was ordered, that from thenceforth, where any person was in contempt, either for want of appearance or of an answer, or for not yielding obedience to any order of the Court, the Serjeant at Arms should apprehend and bring the contemner to the bar of the Court to answer his contempt; and if the contemner could not be found, then to return *non est inventus;* and by the same order it was directed, that it should be made part of all orders for time to answer, or for doing any other act, upon the party entering his appearance with the Registrar, that the party, when he enters such his appearance, should likewise consent that a Serjeant at Arms should go against him, as upon a Commission of Rebellion returned *non est inventus,* in case of non-compliance (*q*). The

(*m*) Hind. 144.
(*n*) Ante, vol. 1, 620.
(*o*) For. Rom. 81.
(*p*) Ante, vol. 1, 618.
(*q*) Ante, vol 1, 620.

Order of the 21st of December, 1833, before referred to, was, as has been stated, framed in conformity with the above regulation. And, in pursuance of the above orders, the practice of the Court now is, that in all cases where a party enters his appearance with the Registrar, whether in compliance with the process of the Court or upon his own application, he must give his consent that, in case of his non-compliance, the Serjeant at Arms shall go against him. The only exceptions to the rule are, where the party is brought up to the bar of the Court for using contemptuous language with respect to the Court, or for beating or abusing any person serving the process of the Court, or other contempt of the like nature, (which contempts are expressly exempted from the operation of the order of the 13th of May, 1721,) in cases of that description, the Order is made without such a stipulation, and the commitment for non-obedience must be executed by the Warden of the Fleet or his deputy attending the Court (r).

In what cases.

General Order, that party entering appearance with the Registrar, do consent that Serjeant at Arms shall go against him, applies to all cases, except those of contempt by words or beating persons serving the process.

An appearance with the Registrar is generally entered by the defendant's Clerk in Court (s), or, if no Clerk in Court has been appointed, the defendant must be taken to the Registrar's Office, where one of the entering Registrars will write a certificate of his appearance and of his undertaking that the Serjeant at Arms shall go against him, upon the writ on which he has been arrested and brought up (t). If the appearance is entered by the Clerk in Court pursuant to an order, either of the Court or of the Master, made in pursuance of the statute 3 & 4 W. 4, c. 94, s. 13, the Clerk in Court applies to the entering Registrar, and enters the defendant's appearance, at the same time signing a consent in writing that the Serjeant at Arms shall go, &c., in case the defendant shall not be discharged from his contempt or put in his answer within the time in the order mentioned; the Registrar at the same time certifies, upon the order, the day and month of the appearance being entered (u).

Method of entering appearance by defendant's Clerk in Court.

Where defendant has no Clerk in Court.

Where in pursuance of an order.

Where a defendant, whose appearance is so entered with the Registrar, is in actual custody, upon payment or tender of the costs of contempt to the plaintiff's Clerk in Court, and service

Defendant in custody, how discharged.

(r) Ante, vol 1, 618.
(s) Hind. 145.
(t) Harr. 112.
(u) Hind. 145.

Proceedings upon.

of the order, with the Registrar's certificate, &c., indorsed, he will discharge the defendant of course; if he refuses to do so, an application must be made to the Court by motion or petition.

Sect. V.—*Of appearing gratis.*

What is a gratis appearance.

It has been before stated, that a defendant may, if he has been informed of a Bill being filed against him, cause an appearance to be entered for him without waiting to be served with a subpœna; and that such a proceeding is called appearing *gratis*.

In what case.

This method of appearing is generally resorted to where a plaintiff serves some only of the defendants with the subpœna, and a defendant who is not served wishes to make an immediate application to the Court in the cause. Thus where a plaintiff filed his bill against the Master, &c., of Christ's College, Cambridge, making the solicitors parties, and served the College with process, but did not serve the Solicitors; the Solicitors appeared gratis, and joined with the College in referring the Bill for impertinence; such appearance was held to be regular, and a motion to discharge it refused with costs (*x*).

Where defendant wishes to refer Bill for impertinence.

A defendant may also appear gratis for the purpose of ascertaining whether the Bill was on the file at the time of issuing the subpœna, and in order to prevent its being antedated (*y*).

Where allowed at the hearing.

A party may, likewise, in certain cases, appear gratis at the hearing, and consent to be bound by the decree (*z*). It is to be observed, however, that in such cases it is necessary that the party should be named as a defendant upon the record; and that where a person, not a party to the suit, was interested in a question, and appeared by Counsel, and submitted to be bound by the decision, the Court held, that they could not hear him without the consent of the other defendants (*a*).

Not unless the defendant be so named in the Bill,

unless by consent.

In such case it seems, that, if all parties consent, the record

(*x*) Fell v. Christ's Coll., 2 Bro. 279.

(*y*) Ante, vol. 2, p. 8.

(*z*) Capel v. Butler, 2 S. & S. 45.

(*a*) Bozon v. Bolland, 1 R. & M. 69; Attorney-general v. Rouen, 7 Sim. 290.

may be brought into Court, and the defendant's name inserted in the record (*b*).

Consequences of.

Defendant cannot defeat plaintiff of his right to move for an injunction *ex parte.*

It is to be observed, that, by appearing *gratis*, which is the voluntary act of the defendant, he cannot deprive the plaintiff of his right to move *ex parte* for an injunction; and, therefore, where a motion was made for an injunction to restrain the cutting of ornamental timber, and the defendant, on the day before the motion was made, entered an appearance gratis, Lord Eldon, nevertheless, granted the injunction, observing, that if a person, about to commit waste, and against whom a bill is filed, could, by appearing the evening before the motion, prevent it, he would get two days for cutting timber (*c*). His Lordship, however, said, that perhaps it might be different where the defendant had appeared so long before the motion that the plaintiff might have given him notice; and there is no doubt that if a plaintiff serves a defendant with a subpœna, he thereby puts him in a situation which entitles him to notice of the application to be made against him (*d*).

Unless there has been sufficient time to serve defendant with notice. Semble.

Time for answering to be computed from appearance.

Where a defendant appears gratis, the time from which he must answer is to be calculated from such appearance, and not from the time of the return of the subpœna (*e*). Whether by appearing gratis a defendant resident in the country would convert the cause from a country cause to a town cause, does not appear to have been expressly decided; and the only cases which occur upon the subject, under the old practice of the Court, leave the question in some uncertainty (*f*). It is presumed, however, that if a defendant, actually resident in the country, after appearing gratis, sues out a commission to take his answer in the country as in a country cause, under the 9th Order of the 21st of Dec. 1833, he will be entitled to the time allowed by the 10th Order to plead, answer, or demur, not demurring alone. At all events, the plaintiff should, if he means

(*b*) Bozon v. Bolland, 1 R. & M. 69; Attorney-general v. Pearson, 7 Sim. 290.

(*c*) Aller v. Jones, 15 Ves. 605; Perry v. Weller, 3 Russ. 519.

(*d*) Perry v. Weller, *ubi supra;* such notice, however, must have the previous leave of the Court to sanction it. Hill v. Rimell, 2 M. & Craig, 641.

(*e*) Hanwarst v. Welleter, 5 Mad. 422; Webster v. Threlfall, 1 S. & S. 135.

(*f*) Vide Earl of Leicester v. Perry, Hind. 93; Bound v. Wells, 3 Mad. 434.

Consequences of.

to dispute the plaintiff's right to such time, move to set aside the commission for irregularity.

Defendant does not lose his right to costs.

A defendant, by appearing *gratis*, does not lose his right to costs; and, therefore, where a defendant, without being served with a *subpœna*, appeared, and put in a plea and answer, and the plea was allowed, Lord Thurlow held that he was entitled to his costs.

CHAP. XII.

OF DEMURRERS.

Sect. 1.—*Of the General Nature of Demurrers.*

When the proper defence.

Whenever any ground of defence is apparent upon the Bill itself, either from the matter contained in it, or from defect in its frame or in the case made by it, the proper mode of defence is by demurrer (*a*).

Origin of the term.

A demurrer has been so termed, because the party demurring, *demoratur*, or will go no further (*b*), the other party not having shewn sufficient matter against him; and it is in substance an allegation by a defendant which, admitting the matters of fact stated by the Bill to be true, shews that as they are therein set forth, they are insufficient for the plaintiff to proceed upon, or to oblige the defendant to answer (*c*); or that, for some reason apparent on the face of the Bill, or because of the omission of some matter, which ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer. It therefore demands judgment of the Court, whether the defendant shall be compelled to answer the complainant's Bill, or that particular part of it to which the demurrer applies (*d*).

Nature of the defence by.

Will only lie where it is clear the Bill will be dismissed afterwards.

A demurrer will lie wherever it is clear that, taking the charges in the Bill to be true, the Bill would be dismissed at the hearing (*e*), but it must be founded on this, that it is an absolute, certain, and clear proposition that it would be so (*f*); for if it is a case of circumstances, in which a minute variation between them as stated by the Bill, and those established by the

Not where it is only probable that it may be so.

(*a*) Ld. R. 86.
(*b*) 3 Bl. Com. 314.
(*c*) Prac. Reg. 162.
(*d*) Ib. Ld. R. 86. Coop. Eq. Pl. 110. Jones v. E. of Strafford, 3 P. Wms. 80.
(*e*) Utterson v. Mair, 2 Ves. J. 95. 4 Bro. C. C. 270. S. C. Hovenden v. Lord Annesley, 2 Sch. and Lef. 607.
(*f*) Brooke v. Hewitt, 3 Ves. 253.

Admissions by.

evidence, may either incline the Court to modify the relief or to grant no relief at all; the Court, although it sees that the granting the modified relief at the hearing will be attended with considerable difficulty, will not support a demurrer; therefore, where a Bill was filed for the specific performance of an agreement entered into by a bankrupt, by the intervention of an agent, and, previous to the bankruptcy, a correspondence took place, through the agent, as to granting a lease, and the case turned upon the point, whether the facts stated amounted to a perfect agreement; Lord Loughborough thought, that, although the circumstances as stated in the Bill, amounted more to a treaty than a complete agreement, the question whether it was an agreement or not must depend very much upon the effect of the evidence, and therefore overruled the demurrer (*f*.)

A Demurrer admits the facts in the Bill to be true.

As a demurrer proceeds upon the ground that, admitting the facts stated in the Bill to be true, the plaintiff is not entitled to the relief he seeks; it is held that, at least for the purpose of argument, all the matters of fact which are stated in the Bill are admitted by the demurrer (*g*), and cannot be disputed in arguing the question whether the defence thereby made be good or not; and such admission extends to the whole manner and form in which it is there stated. Upon this ground, where Bill misstated a deed by alleging it to contain a proviso which it did not, Lord Cottenham, upon the argument of a demurrer to the Bill, refused to allow the defendant's counsel to refer to the deed itself for the purpose of shewing the incorrectness of the manner in which it was set out, although the Bill contained a reference for 'greater certainty as to its contents, &c.' to the deed as being in the custody of the defendants. His Lordship said, that to hold otherwise would be to give the defendants an advantage, depending upon the accident of their having the custody of a document, which the Bill purported to set out and would in effect be to decide the question raised by the demurrer upon matter which was *dehors* the record (*h*). It should be remarked that the object of

Even though the contents of a document be misstated.

Although it is referred to for greater certainty.

(*f*) Brooke v. Hewitt, 3 Ves. 253.

(*g*) E. I. Company v. Hinchman, 1 Ves. J. 289.

(*h*) Campbell v. Mackay, M. & Craig. 603, 613.

referring to the deed, in the case just quoted, was to contradict the statement of a matter of fact in the Bill. When the object of referring to the document is not to contradict but to support the plaintiff's case, the Court will, upon the argument of a demurrer, take upon itself to look into it: thus, where a Bill for the purpose of carrying the trusts of a creditor's deed into execution, was filed by one creditor only on behalf of himself and others, without making all the scheduled creditors parties, or alleging, as a reason for not doing so, that they were very numerous, Sir L. Shadwell, V. C. held that the Court being, from the reference to the deed in the Bill, virtually in the possession of the deed and its schedule, saw for itself that the parties were much too numerous to make it practicable to prosecute a suit if they were all made parties to it (*i*).

Admissions by Plaintiff, however, may read a document referred to in support of his case: *e. g.* to shew the parties are too numerous to sue, although no such allegation in the Bill.

It is also to be remarked, that where a Bill professes to set out a deed inaccurately, and alleges, as a reason for so setting it out, that it is in the possession of the defendants, a demurrer to the Bill cannot be sustained; although according to the terms of the deed, as stated by the plaintiff, he can take no title under it; because the Court will not, under such circumstances, bind the plaintiff by the statement he has made which he alleges to be inaccurate, and which the defendant, therefore, by his demurrer admits to be so. In a case of this description, if the defendant means that the Court should at once be called upon to determine the true construction of the deed, he must plead it (*k*).

Where the Bill professes to set out a deed inaccurately because it is in the defendant's possession.

Plaintiff will not be bound by his statement upon demurrer.

But although a demurrer confesses the matters stated in the Bill to be true, such confession is confined to those matters *which are well pleaded, i. e.* matters of fact (*l*). It does not, therefore, admit any matters of law which are suggested in the Bill or inferred from the facts stated; for, strictly peaking, arguments, or inferences, or matters of law, ought not to be stated in plead-

Matter of fact only admitted by a demurrer,

and not inferences of Law;

(*i*) Weld v. Bouham, 2 S. & S. 91. It is important to remark that where a plaintiff refers in his Bill to a Will, he cannot by virtue of such reference, if the property in discussion be real estate, refer to the probate copy. Per Sir J. Leach, in Gibson v. Whitehead, 4 Mad. 245. In such a case, where is the Court to find the instrument which can be judicially called the will? Ibid.

(*k*) Wright v. Plumptree, 3 Mad. 481.

(*l*) Ford v. Peering, 1 Ves. J. 72. 78.

Admissions by demurrer.

ing (*m*), although there is sometimes occasion to make mention of them for the convenience or intelligibility of the matter of fact; thus, in the case of *Campbell* v. *Mackay* above referred to, the statement, in the Bill, that the deed contained a particular proviso, was held to be so admitted by the demurrer that the deed itself could not be referred to for the purpose of contradicting the record; but if the Bill had gone further, and, after stating the alleged words of the proviso, had averred a legal inference from them which such words did not authorize, the demurrer, although it was held to confess the existence in the deed of a proviso, in the words stated, as a matter of fact, would not have been considered as admitting the inference of law alleged to have arisen from it. An inference of this nature is called a *Repugnancy*, and it is a rule in pleading that a demurrer will not admit matters either of law or of fact which are repugnant to each other: thus, where a bill was filed for a discovery and for an account and delivery up of the possession of land, on the ground that the plaintiff could not describe the land so as to proceed at law, by reason of the defendant having got possession of the title deeds and mixed the boundaries, Lord Loughborough allowed a demurrer, because the Bill was a mere ejectment Bill; but he intimated that, even if the Bill had been for a discovery only, it could not have been sustained, because the averment, that the plaintiff could not ascertain the lands, was contrary to the facts disclosed in the Bill in which the lands were sufficiently described (*n*); and so where a record is pleaded, it has been held, that a demurrer is never a confession of a thing which is against it, but only of that

or matters which are repugnant, whether of fact or Law;

or which are contrary to the Record.

(*m*) Vide, 1 Chitty on Pl. 214. Where it is stated that, in this respect, pleadings at Law appear to differ materially from those in Equity. This, however, is incorrect; the principles of pleading, in this respect at least, are the same both in Equity and at Law; and although in the former, from the greater complexity of the subjects generally brought under the cognizance of Courts of Equity, it is often a more convenient and intelligible course to state the inferences of Law which arise from the facts pleaded, and it is therefore frequently resorted to in practice; yet such practice by no means impugns the applicability of the rule of pleading, above laid down, to pleadings in Equity, any more than the occasional adoption of a similar course in pleadings at Law alters the rule of pleading there. Vide Stephen on Pleading, 347, from which the next paragraph in the text has been taken.

(*n*) Loker v. Rolle, 3 Ves. 4, 7.

Admissions by.

which may stand with the record (*o*). Upon this ground where a Bill averred that certain sums of money advanced by an intestate to the plaintiff were made as gifts and not as loans, and stated a decree of the Court made in another cause in which the same parties were concerned, by which the Court declared that the advances were loans and not gifts; Lord Cottenham, upon argument of a demurrer to the Bill, considered that, the question whether the demurrer could be held to confess the allegation in the Bill that the advances were by way of gift in opposition to the decree of the Court, so clear, that he would not permit it to be argued by the defendant's counsel (*p*).

Or to facts of which the Court takes judicial notice.

It may be noticed, as applicable to this point, that when facts are averred in a Bill which are contrary to any fact of which the Court takes *judicial notice*, the Court will not pay any attention to the averment: thus where, in order to prevent a demurrer, it was falsely alleged in the Bill, that a revolted colony of Spain had been recognized by Great Britain as an Independant State, the Vice Chancellor, upon the argument of a demurrer to the Bill, held, that the fact averred was one which the Court was bound to take notice of as being false, and that he must therefore take it just as if there had been no such averment on the record (*q*). It is to be observed here, that besides the recognition of Foreign States, the Court will also take judicial or official notice of a war in which this country is engaged, but not of a war between foreign countries (*r*). The Court is also bound to notice the time of the king's accession, his proclamations, and privileges; time and place of holding parliaments, the time of sessions and prorogation, and its usual course of proceedings; the Ecclesiastical, Civil, and Maritime Laws; the customary course of descent in *Gavelkind* and *Borough English* tenures; the course of the Almanack (*s*); the division of England into

e. g. the recognition of foreign governments.

Or the existence of a war between this country and another.

Facts of which the Court takes judicial cognizance.

(*o*) Arundel v. Arundel, Cro. Jac. 12. Com. Dig. Pleader. 2, 6.

(*p*) Mortimer v. Fraser, 30 Jan. 1837.

(*q*) Taylor v. Barclay, 2 Sim. 213, ante, vol. 1, p. 23.

(*r*) Dolder v. Lord Huntingfield, 11 Ves. 292, ante, vol. 1, p. 58.

(*s*) Sed vide Mayor of Guildford v. Clark, 2 Vent. 247.

Admissions by.

Counties, Provinces, and Dioceses (*t*); the meaning of English words and terms of Art, even when only local in their use; legal Weights and Measures, and the ordinary measurement of time; the existence and course of proceeding of the superior Courts at Westminster, and the other Courts of *General Jurisdiction*, such as the Courts of the Counties Palatine, &c. and the privileges of its own officers (*u*); it follows, therefore, from the principle before laid down, that where a Bill avers any fact in opposition to what the Court is so officially bound to notice, such averment will, in arguing a demurrer to the Bill, be considered as a nullity.

Sect. II.

Of the different Grounds of Demurrer.

Demurrers to relief.

A demurrer may be either to the relief prayed, or it may be to the discovery only, or to both. If the demurrer is good to the relief, it will be so to the discovery (*a*); if, therefore, a plaintiff is entitled to the discovery alone, and goes on to pray relief, a general demurrer to the whole Bill will be good (*b*).

Secus where the demurrer is partial only.

When, however, the demurrer is to part only of the relief prayed, it will not protect the defendant from a discovery, unless the discovery from which the protection sought, is specially pointed out.

Will protect defendant from discovery.

With regard to what will constitute a Bill for relief for the purpose of supporting a demurrer, it is to be observed, that in *Brandon* v. *Sands* (*c*), it was held, that a mere addition of a prayer for general relief to a Bill making a case for discovery only, would not be a ground for allowing a demurrer. The general opinion of the profession, however, appears to have been against that decision, because in every case it ought to

But a Demurrer to the discovery will not be good to relief.

(*t*) But not the local situation and distance of the different places in a county from each other. Deybel's case, 4 Barn. & Ald. 243.

(*u*) Stephen on Pl. 349, and vide 1 Chitty on Pl. 216, and seq. where further information on the subject will be found.

(*a*) Loker v. Rolle, 3 Ves. 4; Ryves v. Ryves, ib. 347; Muckleston v. Brown, 6 Ves. 63; Barker v. Dacie, ib. 686; Hodgkin v. Longden, 8 Ves. 3; Williams v. Steward, 3 Mer. 502; Barker v. Dacie, 6 Ves. 686; Mucklestone v. Brown, ib. 63; Gordon v. Simpkinson, 11 Ves. 509; Speer v. Crawter, 17 Ves. 216.

(*b*) Price v. James, 2 Bro. C. C. 319; Collis v Swayne, 4 Bro. C. C. 480; Albretcht v. Sussmann, 2 V. and B. 328.

(*c*) 2 Ves. J. 514.

appear most distinctly, whether the Bill is for relief or for discovery only; for if that matter is left in doubt, the defendant may put in his answer, and then the plaintiff may amend his Bill by praying specific relief; and it is now a settled rule that a Bill praying discovery and concluding with a prayer for general relief, is a Bill for relief (*d*). A prayer will not, however, convert a Bill into one for relief, if it merely prays for the equitable assistance of the Court consequential upon the prayer for discovery (*e*); such as a writ of injunction, or a commission to examine witnesses abroad (*f*), or that the testimony of witnesses may be perpetuated (*g*), or that defendant may set forth a list of deeds, &c. and that they may be placed in the hands of the Clerk in the Court (*h*).

To relief.

What constitutes a Bill for relief.

Prayer for general relief.

But not for equitable relief, consequential upon the discovery.

But notwithstanding the general rule, that if the relief prayed is unnecessary or improper, the defendant may cover himself by a general demurrer; yet this will not preclude the defendant, in cases where the plaintiff, if his Bill had been for a discovery only, would have had a right to such discovery from demurring to the relief only, and answering as to the discovery, or in other words, giving the discovery required (*i*).

In what case defendant may demur to relief and not to discovery.

The converse of this proposition, however, will not equally hold; for it has been held, that where a Bill prays relief as well as discovery, the defendant cannot demur to the discovery

In what case defendant may demur to the discovery, and not to the relief.

(*d*) Angell v. Westcombe, 6 Sim. 30; Ambury v. Jones, 1 Younge, 199. In both these cases the Court gave the plaintiff leave to amend, by striking out the prayer for relief on payment of costs, it being apparent that the insertion of the prayer for relief, was made by the inadvertence of the Clerk in Court, by whom it was added to the prayer for process.

(*e*) Brandon v. Sands, ubi supra.

(*f*) Noble v. Garland, 19 Ves. 376; Lousada v. Templer, 2 Russ. 561; King v. Allen, 4 Mad. 247; Thorpe v. Macauley, 5 Mad. 218. vide etiam Prec. in Ch. 532.

(*g*) Hall v. Hoddesdon, 2 P. Wms. 162; Vaughan v. Fitzgerald, Sch. & Lef. 316; Rose v. Gannell, 3 Atk. 439. Sed vide Angell v. Angell, 1 S. and S. 83, in which, however, there was a prayer for general relief.

(*h*) Barker v. Ray, 5 Mad. 65. Crow v. Tyrell, 2 Mad. 408.

(*i*) Hodgkin v. Longden, 8 Ves. 2; Jefferys v. Baldwin, Amb. 164. In Cooper's Equity Pleading, p. 117, the proposition that, 'notwithstanding the establisherd ule, that whenever the relief prayed is unnecessary or improper, the defendant may cover himself by general demurrer; yet as this does not preclude the defendant from demurring only to relief and answering as to the discovery,' is laid down too broadly; it ought to have been confined to those cases, in which it is clear *that the plaintiff is entitled to discovery alone, but has gone on to pray relief;* there can be no doubt that, where the discovery sought is with a view to the relief, a demurrer to the relief would be overruled by an answer to the discovery. Vide Todd v. Gee, 17 Ves. 273.

To relief.

and answer to the relief, for then he does not demur to the thing required, but to the means by which it is to be obtained (*k*). To this rule, however, there are exceptions, viz.—where the discovery sought would subject the defendant to punishment, or to a penalty, or forfeiture, or to any thing of that nature; or where it would tend to shew him to have been guilty of any moral turpitude. In cases of this nature the Court will allow a defendant to protect himself from the particular discovery sought by demurrer, though it will not protect him from the relief prayed, if the plaintiff's title to it can be established by other means than the discovery of the defendant himself. Thus in a Bill to inquire into the reality of Deeds on a suggestion of forgery, the Court has entertained jurisdiction of the cause, though it does not oblige the party to a discovery, and has directed an issue to try whether the deeds were forged or not (*l*).

The Court also, will not, as we shall see presently, require a defendant to make a discovery of matters which are totally immaterial to the relief prayed, or which have been communicated under the seal of professional confidence, or which relate entirely to his own title and not to that of the plaintiff.

At present our purpose is to consider the grounds of demurrer to relief, we shall then consider those grounds of demurrer which apply to the discovery only.

In pursuance of the arrangement before pointed out (*m*), the readers' attention will now be directed to the grounds of demurrer which may exist to original Bills, exhibited for the purpose of obtaining the decree of the Court touching some right claimed by the person exhibiting the Bill, in opposition to rights claimed by the person or persons against whom the Bill is exhibited.

Different grounds of Demurrer to relief.

Demurrers to Bills of this nature may be either, I. to the jurisdiction; II. to the person; or III. to the matter of the Bill, either in substance or form (*n*).

To the jurisdiction.

I. Demurrers to the jurisdiction, are either on the ground, I. that the case made by the Bill does not come within the de-

(*k*) Morgan v. Harris 2 Bro. C. C. 121, 124.

(*l*) Brownsword v. Edwards, 2 Ves. 243, 246; Attorney-general v. Hindley, Prec. in Ch. 214.

(*m*) Ante, vol. 1, p. 403.

(*n*) Coop. Eq. Pl. 118.

scription of cases in which a Court of Equity assumes the power of decision, or II. that the subject matter is within the jurisdiction of some other Court.

To the jurisdiction.

Demurrer because the subject is not within the jurisdiction of a Court of Equity.

I. It would be a task far exceeding the limits of this work, and not strictly within its object, were I to attempt to point out the cases in which a demurrer will hold to a Bill, on the ground that the case made by it does not come within the ordinary cases for relief in a Court of Equity. To do so effectually, under any circumstances, would not be an easy undertaking, but to accomplish it in the concise form in which it must be done in order to keep the present treatise within a tolerable compass, would be impossible. I shall therefore merely direct the reader's attention to the admirable statement of the general objects of the jurisdiction of a Court of Equity, which is to be found in Lord Redesdale's Treatise upon Pleading, and observe, that if the case made by the Bill appears to be one on which the jurisdiction of the Court does not arise, a demurrer will hold. And it is to be observed, that a demurrer will hold equally where the defect arises from the *omission* of matter which ought to be contained in the Bill, or of some circumstance which ought to be attendant thereon for the purpose of bringing the case properly within the jurisdiction; as, where it appears that the case is such as, under no circumstance, can be brought within the ordinary scope of a Court of Equity (*c*); for this reason, wherever it is necessary, in order to afford a ground for the interference of the Court, that the plaintiff's right should have been previously established at law, if the Bill does not state that it has been so established, the defendant may demur, as in *Weller* v. *Smeaton* (*d*), where the Bill stated the plaintiff to be lessee of an ancient mill, and that the defendant had erected floodgates and other works on the river, which deteriorated the plaintiff's right to the mill, and prayed that the defendant might be decreed to pull down those works, (such works having been erected three years) and restained from building new ones, but which did not state the plaintiff's right to have been established at Law, a demurrer for want of Equity was held good (*e*).

Where defect arises from the omission of a necessary circumstance,

***e. g.* a previous trial at law.**

(*c*) Lord Red. 87.

(*d*) 1 Cox. 102.

(*e*) Vide etiam Whitchurch v. Hide, 2 Atk. 391; Lord Tenham v. Herbert, ib. 483; Welby v. Duke of Rutland, 6 Bro. P. C. 575; Pa-

To the jurisdiction.

That the subject of the suit is within the jurisdiction of some other Court.

II. A demurrer, because the subject matter of the suit, is within the cognizance of some other Court, may be on the ground that it is within the jurisdiction either, 1, of a Court of Common Law; 2, of the Ecclesiastical Court; 3, of the Court of Admiralty or Commissioners of Prize; 4, of the Court of Bankruptcy; 5, of some statutory jurisdiction; or, 6, of some other Court of Equity.

That a Court of Law is the proper tribunal.

1. If it appears, by the Bill, that the plaintiff can have as effectual and complete a remedy in a Court of Law as in a Court of Equity, and that such remedy is clear and certain, the defendant may demur (*f*), thus where a Bill was brought by the executrix of an attorney, for money due from the defendant for business done as an attorney, the Court allowed a demurrer to the relief, because the remedy was at Law, and an act of Parliament (*g*) had pointed out a summary method of obtaining it (*h*). And, where asum of money had been paid for goods sold and exported to America, and, after the ship had sailed with them, it was discovered that there had been fraud used in the quantity and quality of the goods, but the plaintiff, being threatened with an action, paid the original price under a protest that he would seek relief in Equity, yet a demurrer was allowed to a Bill, when it was afterwards brought for a discovery and account; though it is quite clear that if the plaintiff had not paid the money, the court would have granted him relief by injunction against the threatened price (*i*).

Upon the same principle, if a Bill is filed for an account, where the subject is matter of set-off, and capable of proof

rish of St. Luke v. the Parish of St. Leonard, 1 Bro. C. C 40. It is to be observed that it is not necessary to establish a right at law before filing a Bill, where the right appears on record, as under letters patent for a new invention, or is grounded on an act of parliament, as in cases of Bills by authors or their assignees, to restrain the sale of books, or where the right appears on record by a former decree of the Court, or where the right *primâ facie* and of common right is vested in the Crown. Lord Red. 119.

(*f*) Coop. Eq. Pl. 125.

(*g*) 2 Geo. 2. c. 23. s. 22.

(*h*) Parry v. Owen, 3 Atk. 740. Amb. 109. vide etiam the form of the demurrer, Beames on Costs, 376. It has been held, however, that a Clerk in Court, being an ancient officer of the Court, may maintain a Bill against a solicitor for payment of a certain sum stated as the amount of his demand for fees and disbursements, Barker v. Dacie, 6 Ves. 681; vide etiam Raneleigh v. Thornhill, 1 Vern. 203, and Mr. Blunt's note to Parry v. Owen in his edition of Ambler, 109.

(*i*) Kemp v. Pryor, 7 Ves. 237.

at Law, it may be demurred to (*k*). And so if a Bill is for the possession of land, or an *Ejectment* Bill as it is called, it may be demurred to even though the Bill charges the defendants to have got the title deeds, and to have mixed the boundaries, and prays a discovery, possession, and account; for the plaintiff, though he is entitled to a discovery, by praying such relief, has rendered his whole Bill liable to demurrer (*l*).

To the jurisdiction.

It is to be recollected that, in many cases, Courts of Equity have assumed a concurrent jurisdiction with Courts of Law, as in cases of account, partition, and assignment of dower (*m*); and that where an instrument on which a title is founded is lost, or fraudulently suppressed or withheld from the party claiming under it, a Court of Equity will interfere to supply the defect occasioned by the accident or suppression, and will give the same remedy which a Court of Common Law would have given if the instrument had been forthcoming (*n*). In all such cases, therefore, a demurrer, because the subject matter of the suit is within the jurisdiction of a Court of Law, will not hold.

Demurrer does not lie where Courts of Law have a concurrent jurisdiction.

Amongst other cases in which Courts of Equity and Courts of Law entertain a concurrent jurisdiction, are those arising upon frauds; therefore, where fraud is made the ground for the interference of this Court, a demurrer will not hold. There is, however, one case in which fraud cannot be relieved against in equity, though a discovery may be sought: that is the case of fraud in obtaining a will, which, if of real estate, must be investigated in a Court of Common Law; and if of personal estate, in the Ecclesiastical Court (*o*).

As in cases of fraud,

unless it be fraud in procuring the execution of a will.

It may also be noticed here, that although, in some cases, the Court will, where a question of fact arises in the course of a cause, direct a feigned issue to be tried in a Court of Law, for the purpose of establishing or negativing such fact; the Court will not entertain a Bill to enforce the specific performance of an agreement, and praying in the alternative that, if it cannot

Demurrer will lie to a Bill praying a feigned issue,

although in the alternative.

(*k*) Dinwiddie v. Bailey, 6 Ves. 136.

(*l*) Loker v. Rolle, 3 Ves. 4. Ryves v. Ryves, ib. 343.

(*m*) Lord Red. 96, 99.

(*n*) Lord Red. 91.

(*o*) Kenrick v. Bramsby, 7 Bro. P. C. 437; Webb v. Claverden, 2 Atk. 424; Bennett v. Vade, ib. 324; Anon. 3 Atk. 17.

To the jurisdiction.

be performed, an issue or an inquiry before the Master may be directed, with a view to ascertain the damages. The plaintiff must seek that remedy, if he wishes it, at Law (*p*).

That the Ecclesiastical Court is the proper jurisdiction.

2. That the objection, on account of the jurisdiction, is not confined to cases cognizable in Courts of Law, is evident from the case put of proceedings instituted to set aside a will of personal estate on the ground of fraud, which can only be done in the Ecclesiastical Courts; those courts having exclusive jurisdiction in all cases relating to wills and intestacies of persons dying possessed of personal property. The Ecclesiastical Courts have also exclusive jurisdiction of the right and duties arising from the state of marriage; and the Court of Chancery, therefore, will not entertain a Bill to enforce a contract for the separation of husband and wife (*q*).

It is to be observed here, that Courts of Equity have, in the case of tithes and in the disposition of the effects of persons dying testate or intestate, assumed a concurrent jurisdiction with the Ecclesiastical Courts, as far as the jurisdiction of these Courts extend; indeed the Courts of Equity, in many of those cases, can give more complete remedy than can be afforded in the Ecclesiastical Courts, and in some cases the only effectual remedy (*r*).

That the Court of Admiralty or Court of Prize is the proper jurisdiction.

3. If the Court of Admiralty or Court of Prize is competent to decide upon the subject matter of the suit, a demurrer will also hold. Upon this principle the Court refused to interfere by granting a prohibition against a monition to bring in property, which had been received as a consignment to a merchant; Lord Eldon holding, that the Prize Jurisdiction extends to the question, whether a person who received and sold the property, received it as consignee for a valuable consideration, or as a prize agent (*s*).

(*p*) Per Lord Eldon, in Todd v. Gee, 17. Ves. 279.

(*q*) Wilkes v. Wilkes, 2 Dick. 791; Worrall v. Jacob, 3 Mer. 268; Durand v. Durand, 2 Cox. 207; Duncan v. Duncan; Coop. C.C. 254. For the distinctions upon th: subject, as to cases in which the Court will interfere to enforce the payment of separate maintenance to a wife pending a separation, vide 2 Roper on Husband and Wife, cap. 22. s. 3.

(*r*) Lord Red. 101.

(*s*) Case of the Danish Ship Noysomhed, 7 Ves. 593.

To the jurisdiction.

That the Court of Bankruptcy is the proper jurisdiction.

4. Although the Court of Bankruptcy has been recently established (*q*), yet, as it only exercises jurisdiction in those cases which were formerly considered to be within the jurisdiction of the Lord Chancellor sitting in Bankruptcy, any Bill which, previously to the establishment of that Court, would have been liable to demurrer, because the subject of it was within the jurisdiction of the Lord Chancellor, will still be liable to demurrer, because the subject matter is within the jurisdiction of the Court of Bankruptcy. A special demurrer on the ground that the plaintiffs might, upon their own shewing, have had full and complete relief under the jurisdiction of the Lord Chancellor in Bankruptcy, was allowed in *Saxton* v. *Davis* (*r*), which has been before referred to; and the principles upon which the Court proceeded in that case are fully stated in the judgment of Lord Eldon, upon that occasion, and are also alluded to in a former part of this treatise, where the effect of bankruptcy upon proceedings in this Court have been discussed at some length (*s*)

That a summary jurisdiction is provided by Statute.

5. The ground upon which, before the establishment of the Court of Bankuptcy, demurrers, by reason that the matter was within the jurisdiction of the Lord Chancellor in bankruptcy, were allowed was, because the legislature had provided a summary course of proceeding for the decision of the question by application to the Lord Chancellor under the Statutes relating to Bankrupts; and the same ground of demurrer will be good in other cases where such a summary mode of proceeding has been provided by Statute. Thus in *Parry* v. *Owen* (*t*), which has been before referred to, as a case in which a demurrer was allowed to a Bill filed by the executrix of an attorney to be paid his bill for business, the grounds of demurrer stated on the record were, "that the plaintiff's remedy to recover what may appear to be due to her from the defendant, touching the matters aforesaid, is and ought to be by suit at Law, where the matters are properly triable and determinable, *or by application to this Court in a summary way*, and not by suit in this Court, &c. (*u*).

(*q*) 1 & 2 W. 4, c. 56.
(*r*) 18 Ves. 72.
(*s*) Ante, vol. 1, p. 71, vide etiam exparte Tarleton, 19 Ves. 464.
(*t*) Ante, p. 28.
(*u*) Vide the copy of the demurrer in this case, in Mr. Blunt's edition of Ambler, 109. n. 2, and Beames on Costs, 376.

To the jurisdiction.

In connection with this part of the subject, may be mentioned, the questions which have arisen as to the right of the Court to entertain Bills to set aside awards made under submissions, which are agreed to be made rules of Court pursuant to the 9 & 10 W. 3. c. 15. Upon this point much difference of opinion has existed. In *Dawson* v. *Sadler* (x), Sir John Leach declared his opinion to be, that where by the agreement of reference the submission is to be made a rule of any Court, there the only course of proceeding to impeach the award is to make the submission a rule of that Court, and to apply summarily for its aid; that the mere circumstance of its not having been made a rule of Court, would not give the Court jurisdiction, because either party has a right to take that step, and cannot transfer the jurisdiction by neglecting to do an act within his own power (y); but the present Vice-Chancellor, Sir L. Shadwell, has expressed his opinion to be, that upon the words of the Statute, the original inherent jurisdiction of the Court is not taken away, except where the submission has been made a rule of a Court of Law; and that the authorities shew, that even in that case it is not of necessity taken away, but will remain in case the Court of Law will not or cannot act upon the award (z).

That some other Court of Equity has jurisdiction,

6. With respect to the objection *that some other Court of Equity has the proper Jurisdiction*, it is to be observed that the establishment of Courts of Equity has obtained throughout the whole system of our judicial polity, and that most of the inferior branches of that system have their peculiar Courts of Equity; the Court of Chancery assuming a general jurisdiction in cases not within the bounds or beyond the powers of inferior jurisdictions (a). The principal of the inferior jurisdictions in England which have cognizance of equitable cases are those of the counties palatine of Lancaster and Durham (b), the Courts of the two Universities of Oxford and Cambridge,

e. g. the Courts of the counties palatine, &c.

(x) 1 S. & S. 537, 542.

(y) Vide Davis v. Getty, 2 S. & S. 411.

(z) Vide Nicholls v. Roe, 5 Sim. 156, and the cases cited i his Honor's judgment.

(a) Lord Red. 122.

(b) By the 6 & 7 W. 4. c. 19. the palatine jurisdiction of the county palatine of Durham, has been separated from the bishoprick and transferred to the crown, but the Courts still remain.

To the jurisdiction.

the Courts of the city of London, and the Cinque Ports (*c*), and wherever it appears upon the face of the Bill, that any of these Courts has the proper jurisdiction, either immediately or by way of appeal, the defendant may demur to the jurisdiction of the Court of Chancery (*d*). Thus, to a Bill of appeal and review of a decree in the County Palatine of Lancaster, the defendant demurred, because, on the face of the Bill, it was apparent that the Court of Chancery had no jurisdiction, and the demurrer was allowed (*e*): demurrers of this kind, however, are very rare; for the want of jurisdiction can hardly be apparent upon the face of the Bill, at least so conclusively as to deprive the Court of Chancery of cognizance of the suit; it being a rule that, *where a Court is a superior Court of general jurisdiction, the presumption will be, that nothing shall be intended to be out of its jurisdiction, that is not shewn or intended to be so* (*f*)." The general way of objecting to the jurisdiction of the Court is by plea; and in *Roberdeau* v. *Rous* (*g*), in which a Bill was filed for delivery of possession of lands, in St. Christopher's, the Lord Chancellor held, that the objection that the Court had no jurisdiction over land in St. Christopher's, although right in principle, was irregularly and informally taken by demurrer, and should have been pleaded. Lord Redesdale, however, appears to have been of opinion, that the rule, that an objection to the jurisdiction should be pleaded, and not be taken by demurrer, can only be considered as referring to

(*c*) Lord Red. 122; formerly the county palatine of Chester and the principality of Wales, had Courts of equitable jurisdiction; viz. in the former, the Court of the Chamberlain of Chester, and in the latter, the Courts of Great Sessions, but these Courts have been abolished by the 11 Geo. 4. & 1 W. 4. c. 70. s. 14.

(*d*) It is to be remarked, that the Court of Exchequer, as a Court of Equity, does not give to any person the privilege of being sued there alone. Lord Red. 133. n. e. It has also been decided that the Stannary Courts in Devonshire and Cornwall, held for the administration of justice among the tinners therein, in virtue of a privilege granted to the workers of the mines, to sue and be sued only in their own Courts, that they may not be drawn from their business, which is highly profitable to the public, by attending law suits in other Courts, are only Courts of Law and not Courts both of Law and Equity. Trelawney v. Williams, 2 Vern. 483.

(*e*) Jennet v. Bishopp, 1 Vern. 184.

(*f*) Per Lord Hardwicke, Earl of Derby v. Duke of Athol, 1 Ves. 203.

(*g*) 1 Atk. 543.

To the jurisdiction.

cases where circumstances may give the Chancery jurisdiction, and not to cases where *no circumstances can* have that effect; and that, where all the circumstances which are requisite in a plea, to shew that the Court has no jurisdiction, are shewn in the Bill, a demurrer will lie (*h*). What those circumstances are, will be stated when we come to treat of pleas to the jurisdiction (*i*); in the meantime, it may be observed, that if the objection on the ground of jurisdiction, is not taken in proper time, viz. either by demurrer or plea, before the defendant enters into his defence at large, the Court having the general jurisdiction, will exercise it; unless in cases where no circumstances, whatever, can give the Court jurisdiction, as in the case before put, of a Bill of appeal and review from a decree in a County Palatine (*k*), in which case, the Court cannot entertain the suit, even though the defendant does not object to its deciding on the subject (*l*).

Within what time objection must be taken.

Demurrers to the person.

II. The objections arising from the personal disability of the plaintiff, have been treated of at considerable length, in the third chapter of this treatise, in which the disabilities that incapacitate a plaintiff from suing have been fully discussed; all, therefore, that need now be said upon the subject is, that if any of these incapacities appear upon the face of the Bill, the defendant may demur. So, also, he may if the incapacity is such only as prevents the party from suing alone, as in the case of an infant or a married woman, an idiot or a lunatic, in which cases, if no next friend or committee be named in the Bill, a demurrer will lie (*m*).

Objection extends to the whole Bill.

It is to be observed that this objection extends to the whole Bill, and that advantage may be taken of it, as well in the case of a Bill for discovery merely, as in the case of a Bill for relief. For the defendant in a Bill for discovery, being always entitled to costs after a full answer as a matter of course, would be materially injured, by being compelled to answer a Bill by persons whose property is not at their own disposal, and who are therefore incapable of paying the costs.

(*h*) Lord Red. 123.
(*i*) Post, chap. xiii.
(*k*) Ubi supra.
(*l*) Lord Red. 124.
(*m*) Ib.

To the substance of the Bill.

III. We come now to the consideration of demurrers arising upon objections applying more specifically to the matter of the Bill; these may be either to the substance or to the form in which it is stated. Demurrers to the substance, are 1st, that the plaintiff has no interest in the subject; 2nd. that although the plaintiff has an interest, yet the defendant is not answerable to him, but to some other person; 3rd. that the defendant has no interest; 4th. that the plaintiff is not entitled to the relief which he has prayed; 5th. that the value of the subject matter is beneath the dignity of the Court; 6th. that the Bill does not embrace the whole matter; 7th. that there is a want of proper parties; 8th. that the Bill is multifarious, and improperly confounds together distinct demands; to which may be added, 9th, that the plaintiff's remedy is barred by length of time, and 10th. that it appears, by the Bill, that there is another suit depending for the same matter.

Demurrer to the substance of the Bill.

Want of interest in the plaintiff.

1. In a former section (*n*) in which the matter of a Bill has been discussed, the readers' attention has been directed to the necessity of shewing that the plaintiff has a claim to the thing demanded, or such an interest in the subject as gives him a right to institute a suit concerning it (*o*). All, therefore, that need now to be done in illustration of the proposition, that the want of interest in the plaintiff in the thing demanded, or of a right to institute a suit concerning it is a good cause of demurrer, is to refer to that section where the nature of the interest which a plaintiff must have in the subject matter, has been pointed out. The reader will there observe that the plaintiff must not only have an existing interest in the subject matter (*p*), and one not capable of being defeated (*q*), but he must also shew a proper title to institute a suit concerning it (*r*), or else his Bill will be liable to demurrer. The nature of the title to be shewn, where a plaintiff claims as a representative or under a derivative title, has been there pointed out, and the rule, that all preliminary acts necessary to complete the plaintiff's title must be shewn, has also been discussed. The

(*n*) Chap vi. sect. 4.
(*o*) Ante, vol. 1, p. 412.
(*p*) Ante, vol. 1, p. 414.
(*q*) Ib. 415.
(*r*) Ib. 416.

To the substance of the Bill.

reader will observe, that the necessity of shewing a proper title in a plaintiff is not confined to one plaintiff only, but that if several persons join in a Bill, and it appears that one of them has no interest, the Bill will be open to demurrer though it appears that all the other plaintiffs have an interest in the matter and a right to institute a suit concerning it (*s*).

That defendant is not answerable to plaintiff but to some other person.

2, 3. The same section also exhibits the nature of the privity which it is necessary the Bill should aver to be existing between the plaintiff and defendant (*t*), and the application of the rule which requires that the Bill should shew that the defendant has an interest in the subject matter of the suit (*u*). It also points out the exceptions to the rule in certain cases in which persons who have no interest in the subject matter, may be made parties for the purpose of eliciting a discovery from them and in which they are prevented from availing themselves of, a demurrer to avoid answering the Bill (*x*).

That defendant has no interest.

That the Bill does not pray proper relief.

4. It has been before stated as one of the requisites to a Bill that it should pray proper relief, to which may be added, that, if for any reason founded upon the substance of the case, as stated in the Bill, the plaintiff is not entitled to the relief he prays, the defendant may demur; many of the grounds of demurrer, already mentioned, are perhaps referable to this head; and, in every instance, if the case stated is such that, admitting the whole Bill to be true, the Court ought not to give the plaintiff the relief or assistance he requires, either in the whole or in part; the defect thus appearing on the face of the Bill, is a sufficient ground of demurrer.

Effect of prayer for general relief.

It is to be observed, in this place, that the question upon a demurrer of this nature, is frequently, not whether upon the case made by the Bill, the plaintiff is entitled to all the relief prayed, but whether he may, under the *prayer for general relief*, be entitled to some relief (*y*): the question how far the defects in the relief prayed in the prayer for special relief may be supplied under the prayer for general relief, which usually forms part of every Bill, has been before discussed; it is only

(*s*) Ante. vol. 1, p. 414; vide etiam, 398.

(*t*) Ib. 427.

(*u*) Ib. 425.

(*x*) Ante, vol. 1, p. 426, vide etiam, 394.

(*y*) Ib. p. 489, Hartley v. Russell, 2 S. & S. 244, 253.

necessary now to remind the reader that such relief must be consistent with the special prayer, as well as with the case, made by the Bill.

To the substance of the Bill.

5. It has been before observed, that every Bill must be for a matter of sufficient value, otherwise it will not be consistent with the dignity of the Court to entertain it (z). The usual method of taking advantage of an objection of this nature is, as we have seen, by motion to take the Bill off the file. There is no doubt, however, that if the objection appears upon the face of the Bill, a demurrer, upon the ground of inadequacy of value, will be held good (a).

That the subject matter is not of sufficient value.

6. A Bill must not only be for matter of a sufficient value, but it must be *for the whole matter*. It is not, however, necessary to discuss here the principle and application of this rule, the readers' attention having been already fully called to it: all that need be said is, that if it appears, by the Bill, that the object of the suit does not embrace all the relief which the plaintiff is entitled to have against the defendant, under the same representation of facts, it will be liable to demurrer, unless it comes within any of the exceptions before pointed out (b).

That the Bill does not embrace the whole matter.

7. The subject of who are the proper parties to be brought before the Court, for the purpose of enabling a Court of Equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the Court perfectly safe to those who are compelled to obey it, and to prevent future litigation, has been before so fully discussed (c), that nothing remains to be said upon it here further than to remind the reader that wherever a want of parties appears on the face of a Bill, it is a cause of demurrer, unless a sufficient reason for not bringing them before the Court is suggested, or unless the Bill seeks a discovery of the persons interested in the matter in question, for the purpose of making them parties (d).

Want of parties,

It is to be observed that the circumstance that if all the parties interested in the subject of the suit were to be brought before the Court, the Bill would be multifarious, has been held

will hold although the addition of new parties would make the Bill multifarious.

(z) Ante, vol. 1, 431.
(a) Ib.
(b) Ib. 432.
(c) Ante, vol. 1, chap. v.
(d) Lord Red. 140.

To the substance of the Bill.

to be no reason for the Court proceeding in the absence of any person who ought to be present, as to any part of the case, and that such a ground cannot be urged in answer to a demurrer for want of parties (*e*). It has, however, been held to be a sufficient reason for the Court, upon argument of the demurrer, to allow the bill to be amended more generally than by merely adding parties; and in the *Attorney-general* v. *The Merchant Taylor's Company* (*f*), the plaintiff was permitted to amend, by striking out the matter which occasioned the necessity for additional parties; and in *Lumsden* v. *Fraser*, before referred to, leave was, on this ground, given to the plaintiff to amend his bill generally (*g*).

Whether a demurrer for want of parties can be put in to part of a Bill.

It is to be remarked, that there appears to be some doubt whether, in cases where the objection for want of parties applies only to part of the Bill, a demurrer to the whole Bill can be supported, or whether the part of the Bill to which such demurrer applies, ought not to be specially pointed out. The doubt is stated in *The East India Company* v. *Coles* (*h*), in which Lord Thurlow appears to have been inclined to think that there could not be a partial demurrer for want of parties, and that, therefore, a demurrer to the whole Bill was proper; but to have wavered in his opinion, in consequence of some cases cited to him by Mr. Mitford, (Lord Redesdale,) in which such partial demurrer had been allowed (*i*). The consequence was, that the case stood over till another day, before which the plaintiff's counsel amended their Bill, paying the costs of the demurrer; so that the question still remains undecided. In the absence, therefore, of further authority upon this point, all that can be done is, to suggest that, although the authorities cited by Mr. Mitford, in the above case, shew that a defendant may make the absence of parties the ground of partial demurrer, yet they do not go the length of establishing the proposition, that where the objection does not go to the whole Bill, a general demurrer will not hold. As far as negative authority

(*e*) Lumsden v. Fraser, 1 M. and Craig. 589, 602.

(*f*) 1 M. & K. 189.

(*g*) For more on the subject of demurrers for want of parties, vide ante, p. 284; and as to amendment of Bill after demurrer allowed, vide post, sect. 5.

(*h*) 3 Swanst. 142 n.

(*i*) Astley v. Fountaine Finch, 4; Attwood v. Hawkins, ib. 113; Bressenden v. Decreets, 2 Cha. Ca. 197.

goes, the case of *Lumsden* v. *Fraser* (*k*) is strongly in point. In that case the Bill was filed against the defendant for an account of the rents and profits of three different estates in his possession, which had been the subject of three separate contracts for sale; and the objection taken by the demurrer was, that the purchasers of those estates were not parties to the suit; and the demurrer, which was to the whole Bill, was allowed. If the principle insisted upon by the plaintiff's counsel, in *The East India Company* v. *Coles*, be correct, the demurrer in *Lumsden* v. *Fraser* should have been separately and specifically directed to each part of the Bill covered by each contract.

To the substance of the Bill.

8. The subject of multifariousness has been discussed at some length in a former part of this treatise (*l*). Since that portion of the work has gone to the press, however, a case of considerable importance, with reference to the subject of demurrers for multifariousness has been decided by Lord Cottenham. In that case, (*Campbell* v. *Mackay* (*m*),) his Lordship held, that where the plaintiffs have a common interest against all the defendants in a suit as to one or more of the questions raised by it, so as to make them all necessary parties for the purpose of enforcing that common interest, the circumstance of some of the defendants being subject to distinct liabilities, in respect to different branches of the subject-matter, will not render the Bill multifarious. The facts of the case were as follow: Sir James Campbell, by a deed of settlement, executed on his marriage with Lady D. L. Campbell, had vested a fund in two trustees, A. and B., upon trust for his wife for life, and after her decease in trust for the sons of the marriage who should attain the age of twenty-one years, and daughters who should attain twenty-one years or marry, with a proviso that the persons to be appointed guardians of the children by his will, together with the trustees of the settlement, should have authority to apply the interest, and also, in certain cases, part of the capital, of the children's presumptive shares, towards their maintenance and advancement during

For multifariousness.

(*k*) 1 M. & Craig, 589.
(*l*) Ante, chap. vi. sect. 4.
(*m*) 1 M. & Craig, 603.

To the substance of the Bill.

their respective minorities. By a second deed, executed after marriage, Sir James Campbell vested another fund in two other trustees, C. and D., but upon similar trusts as those of the first settlement; and by his will, after making some specific bequests to his wife, he bequeathed his property to A., B., and C., upon certain trusts for the benefit of his children; and appointed A., B., and C., his executors and guardians of his infant children in conjunction with their mother. After the death of Sir James Campbell, Lady D. L. Campbell, the wife, together with the children of the marriage, filed a Bill against A., B., C., and D., for the accounts and administration of the property comprised in the two deeds and will, to which Bill a joint demurrer was put in by A., B., and C., on the ground of multifariousness, which was overruled, upon argument, by the Vice-Chancellor, and afterwards by the Lord Chancellor upon appeal, his Lordship being of opinion, that the result of the principles to be extracted from the cases was, that *where there is a common liability and a common interest, the common liability being in the defendants, and the common interest in the plaintiffs, different grounds of property may be united in the same record.*

Whether a party interested in all the questions can object, because the Bill is multifarious as to another defendant, query.

It is to be observed, that, in the above case, three of the defendants only, viz., A., B., and C., demurred; D., who was alleged to be out of the jurisdiction, did not join in the demurrer; and it was urged, in argument, that, as D. was clearly not implicated in the trusts of Sir James Campbell's will, the Bill would be clearly multifarious as to him; and it was contended, that, if the Bill was multifarious as to one defendant, it must necessarily be so as to all. In deciding the case, Lord Cottenham does not appear to have adverted particularly to this argument; but in the case immediately preceding, *Lumsden* v. *Fraser* (n), his Lordship expressed an opinion that a Bill might not be multifarious as to some persons interested in the whole subject-matter, which would be so as to others interested only in part of it. It is to be remarked, however, that in *Lumsden* v. *Fraser*, the learned judge merely put the case as one which might by possibility occur, and did not give any decided opinion upon the point. Indeed, in a subsequent paragraph,

(n) 1 M. & Craig, 589, 602.

To the substance of the Bill.

he expressly guarded himself against being supposed to express any opinion whether the plaintiffs could, in any shape, frame their case so as to be entitled to what they asked by their Bill; so that the question, how far a person against whom the plaintiff is clearly entitled to relief upon all the points of a case, can avail himself of the circumstance that one of the defendants is liable only in respect of part, by means of a demurrer for multifariousness, still remains unaffected by that case. The question, however, appears to have been considered by Lord Eldon, in *Saxton* v. *Davis* (o). In that case the Bill was filed by the plaintiffs principally against Davis, who had been employed by one of them as his agent, and clearly was an accounting party; and it charged, that, owing to Davis's contrivance, a commission of bankrupt had been issued against the plaintiff, who had employed him, under which he had been declared a bankrupt; that Davis had the sole management and direction of the commission, and procured his particular friends, George and Farman, to be appointed assignees; that George afterwards died, having appointed Bruce his executor; that Farman was also since dead, and that *Pater* had been chosen assignee in the stead of George and Farman by the contrivance of Davis; that, after the bankruptcy, the plaintiff, having been defrauded by Davis of the whole of his property, took advantage of an Insolvent Debtors' Act, under which his property was conveyed to Long; but that Long, instead of calling Davis to account, abetted him, and was an active party in many of his acts; that Long was since dead, having appointed Evans his executor. The Bill also stated that no part of the estate of the plaintiff had been fairly sold under the commission; but that Davis possessed himself of the whole under some pretended right or assumed trust, and prayed an account against Davis, and that his purchases might be declared fraudulent, &c.; and it also prayed accounts against Bruce, as the representative of George, one of the original assignees; against Pater, the actual assignee under the bankruptcy; and against Evans, as the representative of Long, the assignee under the Insolvent Act. To this Bill a joint demurrer was put in by all the defen-

Semble, he may.

(o) 18 Ves. 72.

To the substance of the Bill.

dants for want of equity, and also because relief might be had under the jurisdiction in bankruptcy; and another ground of demurrer, on account of multifariousness, was insisted upon, *ore tenus*, at the bar, because the Bill called for an account against the assignee under the Insolvent Act, and also against the assignee under the commission of bankrupt, without shewing any connexion or collusion between them; and Lord Eldon was of opinion that the demurrer for multifariousness must be allowed; because the Bill, seeking to enforce demands against persons liable respectively, but not as connected with each other, was clearly multifarious, and that the plaintiff could not bring into the same record the representatives of George and Long, but by a case differently stated from that upon the Bill; and his Lordship said, if they could take advantage of this objection by demurrer, Davis might take advantage of it equally, as another suit might be instituted against him to-morrow.

Goes to the whole Bill.

It may be observed here, that a demurrer for multifariousness goes to the whole Bill, and that it is not necessary to specify the particular parts of the Bill which are multifarious (*p*). It appears formerly to have been considered necessary that, as the defendants may combine together to defraud the plaintiff of his rights, and such combination is usually charged by the bill, a defendant demurring for multifariousness must so far answer the Bill as to deny combination (*q*). This rule, however, appears not to be now acted upon (*r*). It is presumed, however, that the effect of an answer to such part of the Bill as charges combination, would not have the effect of overruling a demurrer for multifariousness, provided it extends no further (*s*).

Charge of combination need not be answered.

For length of time.

9. The length of time which has elapsed since the plaintiff's claim arose, has not hitherto been classed amongst the causes of objection to a Bill of which the defendant may avail himself by demurrer. It was formerly considered that length of time

(*p*) East India Comp. v. Coles, 3 Swanst. 142 n.

(*q*) Ld. R. 147; and vide Bull. v. Allen, Bunb. 69; Powell v. Arderne, 1 Vern. 416; vide etiam Lord Eldon's judgment in Lansdown v. Elderton, 8 Ves. 526.

(*r*) Vide Brookes v. Whitworth, 1 Mad. 86.

(*s*) Powell v. Arderne, 1 Vern. 416.

To the substance of the Bill.

was a proper ground for a plea, and not for a demurrer; and in *Gregor* v. *Molesworth*(*t*), Lord Hardwicke refused to allow a demurrer of this nature, alleging, as his reason, that several exceptions might take it out of the length of time, as infancy or coverture, which the party should have the advantage of shewing, but which cannot be done if demurred to. This, however, can hardly be a sufficient reason for the distinction in this case between a plea and a demurrer, as the plaintiff, if he has any reason to allege to take his case out of the bar, arising from the length of time, may shew it by his Bill; and it appears to be clearly the rule of the Court, that the Statute of Limitations, or objections in analogy to it, upon the ground of laches, may be taken advantage of by way of demurrer as well as by plea(*u*). It is to be observed, that, previously to Lord Hardwicke's time, demurrers had been allowed to Bills to redeem mortgages on account of the length of time(*x*); and that, since that period, in *Beckford* v. *Close*(*y*), Lord Kenyon, when Master of the Rolls, sitting at the Cockpit upon an appeal, confirmed a decision which had been made by the Court in Jamaica, allowing a demurrer to a Bill for redemption, on the ground of length of time. That case was cited before Lord Alvanley, M. R., in *Hardy* v. *Reeves*(*z*), who said he had no doubt that a demurrer on the ground of length of time to a Bill for redemption, would be good, if the Bill was so framed as to state such a case. In *Deloraine* v. *Browne*(*a*), however, an attempt was made to take advantage of length of time by demurrer, and Lord Thurlow

Effect of Statute of Limitations.

(*t*) 2 Ves. 109. Vide etiam Aggas v. Pickerell, 3 Atk. 225.

(*u*) Suits in equity are not within the words of the Stat. 21 Jac. 1, c. 16; but Courts of Equity have held themselves bound by it in respect of all legal titles and demands. Hovenden v. Ld. Annesley, 2 Sch. & Lef. 630, 631; Hony v. Hony, 1 S. & S. 568. And in respect of equitable titles and demands, they have been influenced in their determinations by analogy to it. Bond v. Hopkins, 1 Sch. & Lef. 428. Hovenden v. Ld. Annesley, ubi supra; Stackhouse v. Barnston, 10 Ves. 466; Exp. Dewdney, 15 Ves. 496; Beckford v. Wade, 17 Ves. 97; Marquis of Cholmondeley v. Clinton, 2 J. & W. 1. 161, 2 J. & W. 192, S. C. By the stat. 3 & 4 W. 4, c. 27, however, suits in equity for certain purposes, and amongst others, for the redemption of mortgages, are expressly brought within its words. Vide sects. 24, 25, 26 27, 40, 41, and 42 Vide etiam post, chap. xiii. "Of Pleas."

(*x*) Sanders v. Hoare, 1 Ch. Rep. 184; Frazer v. Moor, Bunb. 54; Jenner v. Tracey, 3 P. Wms. 287.

(*y*) Cited 4 Ves. 476.

(*z*) 4 Ves. 466.

(*a*) 3 Bro. C. C. 633.

To the substance of the Bill.

overruled the demurrer; but his Lordship's judgment, in that case, did not meet with the concurrence of Lord Redesdale, who, in *Hovenden* v. *Lord Annesley* (*b*), expressed his disapprobation of it. The principle of allowing length of time to be taken advantage of by demurrer as well as by plea, has since been acknowledged and acted upon by the Court in *Foster* v. *Hodgson* (*c*), where a demurrer to a Bill for an account was allowed, on the ground that no demand was stated by the Bill to have been made for twelve years; and in *Hoare* v. *Peck* (*d*), a similar demurrer was allowed by Sir L. Shadwell, it appearing upon the face of the Bill that the cause of suit did not arise within six years before the filing of it.

Can only hold where there is a positive limitation of lien,

It is to be remarked here, that all the above cases were decided upon the ground of their coming within the Statute of Limitations, of the 21 Jac. 1, c. 16, or the rules of the Court which have been adopted by analogy to that Statute, and that, therefore, there was a positive limitation of time upon which the Court could proceed; where, however, there is no such positive limitation of time, the question whether the Court will interfere or not, depends upon whether, from the facts of the case, the Court will infer acquiescence or confirmation or a release; such inference is an inference of fact, and not an inference of law, and cannot be raised on demurrer (*e*), because a defendant has no right to avail himself by demurrer of an inference of fact upon matters on which a jury in a Court of Law would collect matter of fact to decide their verdict, if submitted to them, or a Court would proceed in the same manner in equity (*f*).

but not where question is only upon the fact whether the Court will infer acquiescence.

10. Although there has been no positive decision upon the subject, there is no doubt that if it appears, by the Bill, that there is another suit depending relating to the same matter, a defendant may demur (*g*). Such a demurrer, however, will not hold, unless it appears, by the Bill, that the suit already depending will afford to the plaintiff the same

(*b*) 2 Sch. & Lef. 607.
(*c*) 19 Ves. 180.
(*d*) 6 Sim. 51.
(*e*) Cuthbert v. Creasy, Mad. & Geld. 189.
(*f*) Ld. R. 173.
(*g*) Law v. Rigby, 4 Bro. C. C. 60.

relief as he would have been entitled to under the Bill which is the subject of the demurrer (*g*).

To the substance of the Bill.

Demurrer to the form of the Bill.

With respect to demurrers by reason of the deficiency of the Bill, in matters of form, the grounds upon which they may be put in have been so amply stated before, that all which is necessary in this place is summarily to recal them to the readers' attention. They are as follows:—1. Because the plaintiff's place of abode is not stated (*h*). 2. Because the facts essential to the plaintiff's right, and within his own knowledge, are not alleged *positively* (*i*). 3. Because the Bill is deficient in certainty (*k*). 4. Because the plaintiff does not by his Bill offer to do equity where the rules of the Court require that he should do so (*l*), or to waive penalties or forfeitures where the plaintiff is in a situation to make such waiver (*m*). To these may be added, 5, the want of Counsel's signature to the Bill (*n*); and 6, the absence of the proper affidavit in those cases in which the rules of the Court require that the plaintiff's Bill should be accompanied by such an instrument (*o*).

Demurrers to the discovery.

The grounds of demurrer before pointed out apply to the relief prayed by the Bill, and not to the discovery further than as it is incidental to the relief. It has, however, been stated that there are cases in which a defendant may demur to the discovery sought by the Bill, although such demurrer will not extend to preclude the plaintiff from having the relief prayed, provided he can establish his right to it by other means than a discovery from the defendant himself. These cases chiefly occur where there is any thing in which the situation of the defendant renders it improper for a Court of Equity to compel a discovery, either because the discovery may subject the defendant to pains and penalties, or because it may subject him to some forfeiture, or to something in the nature of a forfeiture. A defendant may also demur to any part of the discovery sought by the Bill, which is immaterial to the relief prayed; he

Different sorts of.

(*g*) Law v. Rigby, 4 Bro. C. C. 60. Vide post, chap. xiii. "Of Pleas."
(*h*) Ante, vol. 1, p. 463.
(*i*) Ib. 465.
(*k*) Ib. 476, 481.
(*l*) Ante, vol. 1, p. 497.
(*m*) Ib. 498.
(*n*) Ib. 409.
(*o*) Ib. 503.

To the discovery.

may likewise protect himself, by demurrer, from a disclosure of matters which are the subject of professional confidence, or which may lead to a disclosure of his own title in cases where there is not sufficient privity between him and the plaintiff to warrant the latter in requiring a disclosure of it.

That the discovery will expose defendant to a penalty or forfeiture.

1. We have before seen that in cases where the plaintiff is the person who is entitled to the advantage of the penalty (*o*), or of the forfeiture to which the defendant would render himself liable by making the discovery sought, he may obviate a demurrer by expressly waiving his right to the penalty or forfeiture in his Bill, the effect of which waiver is to enable the defendant, in case the plaintiff should sue him for the penalty, or endeavour to take advantage of the forfeiture, to apply to the Court for an injunction to restrain him from proceeding (*p*).

Where it cannot be waived by plaintiff.

But where the forfeiture or penalty is not of such a nature that the plaintiff can by waiver relieve the defendant from the conconsequence of his discovery, a demurrer will hold.

Rule that persons cannot be compelled to subject himself to punishment,

For it is a general rule, that no one is bound to answer so as to subject himself to punishment, in whatever manner that punishment may arise, or whatever may be the nature of that punishment, whether it arises by the ecclesiastical law or by the law of the land (*q*).

applies not only to cases where the discovery must, but where it may do so;

This rule is not confined to cases in which the discovery ***must*** necessarily subject the defendant to pains and penalties, but it extends to cases where it ***may*** do so. If, therefore, a Bill charges any thing which, if confessed by the answer, may subject the defendant to a criminal prosecution (*r*), or to any particular penalties as an usurious contract (*s*), maintenance (*t*), champerty (*u*), simony (*v*), or subornation of

(*o*) Ante, vol. 1, 498.

(*p*) Ib. 499.

(*q*) Brownsword v. Edwards, 2 Ves. 243, 244; Harrison v. Southcote, 1 Atk. 528, 539. Vide etiam the cases there referred to *notis*, and Parkhurst v. Lowten, 2 Swanst. 214; Hare on Discovery, 131-132, where the cases are classed.

(*r*) E. I. Company v. Campbel, 1 Ves. 246; Chetwynd v. Lindon, 2 Ves. 450; Cartwright v. Green, 8 Ves. 405; Claridge v. Hoare, 14 Ves. 65; Maccallum v. Turton, 2 Y. & J. 183.

(*s*) Earl of Suffolk v. Green, 1 Atk. 450; Chauncey v. Tahourden, 2 Atk. 393; 22 Vin. ab Usury, Q 4; Whitmore v. Francis, 8 Price, 616.

(*t*) Penrice v. Parker, Rep. Temp. Finch, 75; Sharp v. Carter, 3 P. Wms. 375; Wallis v. Duke of Portland, 3 Ves. 494; The Mayor of London v. Ainsley, 1 Anst. 158.

(*u*) Hartley v. Russell, 2 S. & S. 252.

(*v*) Attorney-general v. Sudell, Prec. in Ch. 214; Parkhurst v. Lowten, 1 Mer. 391, 401.

perjury (*x*), the defendant may, by demurrer, protect himself from the discovery. In the application of this principle it has been held, that a married woman will not be compelled to answer a Bill which would subject her husband to a charge of felony (*y*).

To the discovery.

It is not necessary to the validity of an objection of this nature, that the facts inquired after have an immediate tendency to criminate the defendant; he may equally object to answering the circumstances, though they have not such an immediate tendency (*z*). This was very clearly laid down by Lord Eldon, in *Paxton* v. *Douglas* (*a*), in which his Lordship said, "In no stage of the proceedings in this Court can a party be compelled to answer any question, accusing himself, *or any one in a series of questions* that has a tendency to that effect: the rule in these cases being, that he is at liberty to protect himself against answering, not only the direct question, whether he did what was illegal, but also every question fairly appearing to be put with the view of drawing from him an answer containing nothing to affect him, except as it is one link in a chain of proof that is to affect him." A defendant, however, although he is not compellable to answer, whether he has committed an act of bankruptcy, because by so doing he lays himself open to the penal consequences of the bankrupt law, cannot protect himself from a discovery, whether he traded or not, although before a man can be bankrupt he must be a trader (*b*).

and to all the circumstances attending it.

That it will subject defendant to a penalty.

Defendant cannot be compelled to answer as to an act of bankruptcy;

but must answer whether he was a trader.

It results from the principle above laid down, that a defendant is not bound to make any discovery which may tend to shew himself to have been guilty of any moral turpitude, which may expose him to ecclesiastical censure; thus it has been held that a defendant is not bound to discover whether a child was born out of lawful wedlock (*c*), nor is an unmarried woman bound to discover whether she and the plaintiff cohabited together (*d*).

Rule extends to cases of moral turpitude, which may expose him to punishment in Ecclesiastical Court.

(*x*) Selby v Crew, 2 Anst. 504; Baker v. Pritchard, 2 Atk 388.

(*y*) Cartwright v. Green, 8 Ves. 405; ante, vol. 1, p. 212.

(*z*) E. I. Company v. Campbel, 1 Ves. 247.

(*a*) 19 Ves. 225. Vide etiam Maccallum v. Turton, 2 Y. & J. 183; Claridge v. Hoare, 14 Ves. 59; Thorp v. Macauley, 5 Mad. 220.

(*b*) Chambers v. Thompson, 4 Bro. C. C. 434.

(*c*) Attorney-general v. Duplessis, Parker, 163.

(*d*) Franco v. Bolton, 3 Ves. 370.

To the discovery.

It has been held, however, that a woman is bound to discover where her child was born, though it might tend to shew the child to be an alien (*e*). It has also been held, that though parties may demur to any thing which may expose them to ecclesiastical censure, a defendant cannot protect himself from discovery whether he has or has not a legitimate son (*f*); and it is to be observed, that the objection to answering, upon the ground that the answer might shew a defendant to be guilty of moral turpitude, appears to be confined to those cases where the moral turpitude is of such a nature as would lay the party open to proceedings in the Ecclesiastical or other Courts. In other cases, a defendant is bound to answer fully, notwithstanding his answer may cast a very great degree of reflection on his moral character (*g*). Therefore, where a defendant demurred to such part of the Bill as sought a discovery from her, as to a conspiracy or attempt to set up a bastard child, which she pretended to have by a person who kept her, and was desirous to have a child by her, the demurrer was overruled (*h*), because the conspiracy or attempt to set up the bastard, not being alleged to have been for the purpose of defeating the heir, was not of itself an offence.

In other cases defendant must answer, though discovery may reflect upon his moral character.

It is also to be observed, that though a discovery may subject a defendant to penalties to which the plaintiff is not entitled, and which he consequently cannot waive, yet if the defendant has expressly covenanted not to plead or demur to the discovery sought, he will be compelled to answer. Thus where the defendant was a supercargo of a ship belonging to the South Sea Company, who, on his appointment, had entered into a bond with sureties of £5000 penalty, not to trade to any of the places prohibited by a certain Act of Parliament and treaty of peace between this country and Spain, called the *Assiento* Contract, and had covenanted not to demur or plead to any Bill which should be brought against him in equity for a discovery as to his trading or dealings contrary to his agreement; upon a Bill being brought, charging him with several breaches of his covenant, to the prejudice of

Rule does not extend to cases where defendant has covenanted not to plead or demur.

(*e*) Attorney-general v. Duplessis, ubi supra.

(*f*) Finch v. Finch, 2 Ves. 491.

(*g*) Per Lord Eldon in Parkhurst v. Lowten, 1 Mer. 400.

(*h*) Chetwynd v. Lindon, 2 Ves. 450.

To the discovery.

the plaintiffs, and for a discovery, &c., waiving the penalty of the bond, the defendant pleaded the Statute 9 Anne, and several articles of the *Assiento* Contract, (whereby whoever traded contrary thereunto were liable to great penalties, such as confiscation of ship and goods, and other forfeitures,) and insisted that he was not bound to discover matters which might subject him to such forfeitures; and it was held, that since the defendant had expressly covenanted not to plead or demur to a discovery, he should not be allowed to object, to the covenant which he had entered into, by his plea (*i*). It has also been decided, that if a person by his own agreement subjects himself to a payment in the nature of a penalty, if he does a particular act, a demurrer to a discovery of that act will not hold (*k*). Thus where a lessee covenanted not to dig loam, clay, sand, or gravel, except for building, on the land demised, with a proviso that if he should dig any of those articles for any other purpose he should pay to the lessor 20*s*. a cart load, and he afterwards dug great quantities of each article; upon a Bill being filed by the lessor for a discovery of the quantities, waiving any advantage of possible forfeiture of the term, a demurrer by the lessee, because the discovery might subject him to a payment by way of penalty, was overruled (*l*). Upon the same principle, where defendants in the situation of servants to a public company, have bound themselves to pay, or to permit the company to deduct or retain in account, a specified sum in case of a breach of the regulations of their service, they will not be permitted to protect themselves from answering as to breaches of such regulations, because the payment to which they have subjected themselves is in the nature of a penalty (*m*).

or to cases in which defendant agrees to subject himself to a payment in the nature of a penalty;

It should also be mentioned, that there are cases in which the defendant has not been allowed to protect himself from discovery, on the ground that he might thereby render himself

or where the defendants have held themselves out as filling particular situations, which they were not entitled to.

(*i*) South Sea Company v. Bumsted, 1 Eq. Ca. Ab. 77; E. I. Company v. Atkin, cited ib. 1 Stra. 168.

(*k*) Lord Red. 159; Morse v. Buckworth, 2 Vern. 443; E. I. Company v. Neave, 5 Ves. 173.

(*l*) Richards v. Cole, or Brodrepp v. Cole. In Cha. Hil. Vacation, 1779.

(*m*) African Company v. Parish, 2 Vern. 244; E. I. Company v. Neave, ubi supra.

To the discovery.

liable to punishment or penalties, even though he has not entered into any covenant not to demur to such discovery. Thus, in *Green* v. *Weaver* (*n*), where a broker of the city of London, who was charged with fraud, in giving fictious names as those of the vendors of merchandize which he had purchased for the plaintiff, and in making a secret profit beyond his brokerage, objected to answer, on the ground that he had given a bond, and taken an oath to perform the duties of his office, of which the alleged transaction would be a breach; and the partners of the broker, who were also defendants, alleged that they had not been admitted as brokers, and relied, as an excuse for not answering, on the penalties imposed by Statute on persons so acting; the Vice Chancellor, Sir A. Hart, held, that the defendants were bound to answer, on the ground that, by holding themselves out as brokers, and thereby inducing the plaintiff to place confidence in them as such, they had contracted an obligation of a higher kind than one under a covenant not to protect themselves from a discovery; and that, if the defendants were not bound to answer, they might render those acts of parliament, which were framed for the purpose of protecting principals from the dishonesty of their agents, perfectly nugatory.

His honor also observed, that if a Court of Equity were to give effect to a defence so constituted, he did not know that there could be any reason why an executor or administrator, who had made oath, duly to administer the assets, and executed a bond for that purpose, might not allege those matters in answer to a Bill of discovery, charging him with fraudulently rendering an account of the assets.

Exception to the rule in certain cases of conspiracy,

The rule that a defendant is not bound to answer in cases which may subject him to punishment or penalties, appears also to be liable to modification, in some cases, where the facts charged in the Bill would amount to conspiracy; and also, in certain cases where the defendants would appear to be guilty of fraud, or of publishing a libel which might be the subject of indictment.

It has been before stated (*o*), on the authority of a case in the

(*n*) 1 Sim. 404.

(*o*) Ante, vol. 1, p. 483.

To the discovery.

Exchequer (*o*), that an answer to a charge of unlawful combination cannot be compelled. This is principally on the ground, that such a combination would amount to a conspiracy, which is an indictable offence. In *Dummer* v. *Corporation of Chippenham* (*p*), however, Lord Eldon, with reference to a demurrer upon that ground, said, "I am perfectly satisfied, that by allowing the demurrer, I should destroy the jurisdiction; as without the ordinary words, charging the parties with combining and confederating, in nine cases out of ten, from all time past, they would, upon modern doctrine, be liable to indictment; yet Courts of Equity have been constantly compelling a discovery" (*q*). So there is no doubt that, in many cases of fraud, Courts of Equity have compelled a discovery where the fraud was of such a nature, that the defendants might have been liable to a criminal prosecution; as in the cases mentioned by Lord Eldon, in *Macauley* v. *Shackell* (*r*), as having frequently occurred in the Court of Exchequer, in which it was the practice with underwriters, where polices of insurance were found to be affected with gross frauds, to bring the parties into Court, and compel them to answer, by stating in their Bills, frauds which would have been indictable. The question how far a party may be compelled to answer, in cases where the discovery may shew him to have been guilty of publishing a libel, has been very fully discussed in the case of *Macauley* v. *Shackell* above referred to; but as the discovery sought in that case, was in aid of an action at law, and not with a view to specific relief in this Court, it will be more properly noticed in a future part of this work (*s*).

Or of fraud.

Or of libel.

It may be mentioned here, that the legislature has, in some cases, expressly provided, that parties to transactions rendered illegal by Statute, shall be compelled to answer Bills in Equity for the discovery of such transactions; in such cases, of course, the defendant cannot protect himself from the discovery required, on the ground that it will render him liable to the

Or where the legislature has provided, that defendant shall answer, notwithstanding, the discovery may subject him to penalties.

(*o*) Oliver v. Haywood, 1 Anst. 82.

(*p*) 14 Ves. 245, 251.

(*q*) Vide etiam, his Lordship's observation in Mayor of London v. Levy, 8 Ves. 404, and Hare, on Discovery 143.

(*r*) 1 Bligh, N. S. 96.

(*s*) Vide post, suits in aid of other Courts

To the discovery.

As in cases under the Stock Jobbing Act.

penalties imposed by the Statute itself. Thus, if a Bill is filed for a discovery, as to transactions which would render the defendant liable to penalties under the 7 Geo. 4, c. 8, commonly called, the 'Stock Jobbing Act,' the defendant cannot protect himself from such discovery, because, by the second section of the Act, a party is bound to answer any Bill that may be filed in a Court of Equity (*t*).

Or under the Acts to prevent gaming;

It is to be observed, that the Statute 9 Anne, c. 14, ss. 3, 4, for the prevention of gaming, also gives the power of compelling a discovery of money won at play, and takes away the penalty as against a party who shall make discovery and repayment; but it has been held, that this Statute does not extend to compel a discovery in aid of an action by a common informer, but only in aid of the party by whom the money is lost, so that a demurrer, on the ground that the discovery will expose the defendant to the penalties of that act, will lie (*u*).

or where the time within which the penalty may be recovered, has expired.

—— after the demurrer put in, but before argument.

If a party be liable to a penalty or forfeiture, provided he is sued within a limited time, and the suit is not commenced till after the limitation has expired, the defendant will be bound to answer fully, even though, by so doing, he may expose his character and conduct to reflection (*x*); and it seems that the plaintiff is entitled to an answer, if the liability ceases after the defence has been put in, and before it is heard, even though there was a liability at the time of putting in his defence. Thus, where a defendant pleaded a Statute giving penalties upon the acts with which he was charged, and the time of suing for the penalties expired before the hearing of the plea, the plea was overruled (*y*); and so where the time for suing for penalties to the Crown had elapsed after exceptions had been taken to the first answer, and before the second answer came in, the reason of the protection failed; the Court held, that

(*t*) Bancroft v. Wentworth, 3 Bro. C. C. 11. It is to be observed that, under that Act, the defendant will not be protected from the discovery, unless the case comes within the first section of it; and that the defendants are at liberty to avoid discovery, in cases which come within the 5th and 8th sections. Bullock v. Richardson, 11 Ves. 375, and ante, vol. 1, p. 488. Billing v. Flight, 1 Mad. 230.

(*u*) Orm v. Crockford, 13 Price, 376.

(*x*) Parkhurst v. Lowten, 1 Mer. 400.

(*y*) Corporation of Trinity House v. Burge, 2 Sim. 411.

To the discovery.

the defendant was bound to answer fully (*a*); and although the above questions arose, in one instance, upon a plea, and in the other, upon exceptions to an answer, there is no doubt that the same decision would be come to, in case the objection to answering were to be taken by demurrer.

—— where Bill is by personal representative, and penalty does not go to him.

It has been before stated, that if the executor or administrator of a parson bring a Bill for tithes, he need not offer to accept the single value (*b*), the reason of which rule is that the treble value is not given, by the Statute, to the representatives, and there can be no doubt that the same reason will be valid against allowing a demurrer in all cases where the penalty is personal, and does not survive to the representatives of the person entitled to sue for it (*c*).

Where the discovery will subject defendant to a forfeiture,

Some of the cases in which a demurrer will lie to a Bill, on the ground that the discovery required will expose the defendant to a forfeiture, have been before referred to (*d*), for the purpose of illustrating the principle, that where it is in the power of a defendant to waive such forfeiture, his omission to do so may be taken advantage of by demurrer; the Bill, however, will be equally liable to this species of objection in cases where the plaintiff has no power to waive the effects of the discovery, as in those where he has such power and omits to exercise it. Therefore, where the discovery sought by an information would have subjected the defendants to a *quo warranto*, a demurrer was allowed (*e*); and so if a Bill should be filed to set aside an usurious contract, a defendant may demur to the discovery of what interest he agreed to take, because he cannot set that forth without disclosing any interest he has taken (*f*). In like manner where a legacy was given to a woman, on her marriage, with a condition, that if she married without the consent of the trustees under the will, the legacy was to be forfeited; and a Bill was filed against the legatee for a discovery whether any marriage had taken place, in which it was

or to proceedings which would occasion a forfeiture.

(*a*) Williams v. Farrington, 3 Bro. C. C. 38.

(*b*) Ante, vol. 1, 499.

(*c*) Vide Hare on Discovery, 148.

(*d*) Ante, v. 1, 498.

(*e*) Attorney-general v. Reynolds, 1 Eq. Ca. Ab. 131, pl. 10.

(*f*) Per Lord Hardwicke, in Chauncey v. Tahourden, ubi supra; Earl of Suffolk v. Green, 1 Atk. 450.

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alleged she had married without consent, Lord Hardwicke allowed the demurrer, as she could not answer to the marriage without shewing, at the same time, that it was against consent (*g*). It is to be observed that, in a case of this nature, where the husband and wife put in separate answers, under an order for that purpose, and the husband, by his answer, admitted the marriage without consent, but the wife omitted to do so, Lord Talbot, upon exceptions being taken to her answer, said, that he could not reconcile himself to compelling a wife to confess that by which she might forfeit all she had in the world, and held the answer to be sufficient (*h*).

Rule does not apply to cases where the discovery would only occasion the taking effect of a limitation over,

It is to be remarked, that this rule applies only to cases where a forfeiture, or something in the nature of a forfeiture, may be incurred; where the discovery sought merely extends to the performance of a condition, upon failure in which a limitation over is to take effect, the defendant cannot protect himself from the discovery. Thus where a husband, by will, gave an estate to his wife, whilst she continued his widow, with a limitation over in case of her second marriage, and the remainder-man brought a bill against her in which he sought a discovery of her second marriage, upon the defendant demurring to the discovery, as subjecting her to a forfeiture, Lord Talbot overruled the demurrer (*i*). A demurrer, also, will not prevail where the discovery is of a matter which shews the defendant disqualified from having any interest or title: as whether a person claiming a real estate, under a devise, be an alien, and consequently incapable of taking by purchase (*k*). A distinction, however, appears to exist, in this respect, between incapacities which are the result of general principles of law, and those which are imposed by the legislature, by way of penalty or forfeiture: thus, before the repeal of the Statutes imposing disabilities upon persons professing the Popish Religion (*l*), it was held, that a defendant was not obliged to dis-

or shew the defendant to be disqualified,

unless such disqualification is in the nature of a forfeiture.

(*g*) Chancey v. Fenhoulet, 2 Ves. 265; Chauncey v. Tahourden, 2 Atk. 392. S. C.

(*h*) Wrottesley v. Bendish, 3 P. Wms. 236; ante, v. 1, 211.

(*i*) Cited Chauncey v. Tahourden, ubi supra; Chancey v. Fenhoulet, 2 Ves. 265; Lucas v. Evans, 3 Atk. 260; Monnins v. Monnins, *contra*, 2 Ch. Rep. 68.

(*k*) Attorney-general v. Duplessis, Parker, 144.

(*l*) 11 & 12 W. 3. c. 4. s. 4.

To the discovery.

cover whether he was a Papist or not (*m*); and so where a Bill sought a discovery from the defendant, whether a person from whom he purchased was not, before he conveyed the estate to the defendant, a person professing the Popish religion, it was held that the defendant was not obliged to answer (*n*). Upon the same principle, it has been held, that where a Bill sought a discovery, whether a clergyman had been presented to a second living which avoided the first, under the Statute 21 H. 8, a demurrer to the discovery of that fact would lie; because the incapacity of holding the first living incurred, in that case, by the acceptance of the second, was in the nature of a penalty imposed by the Statute (*o*).

Because defendant hath in conscience an equal right with plaintiff.

II. If a defendant has, in conscience, a right equal to that claimed by a person filing a Bill against him, though not clothed with a perfect legal title, a Court of Equity will not compel him to make any discovery which may hazard his title; and if the matter appear clearly on the face of the Bill, a demurrer will hold (*p*); the most obvious case is that of a purchaser for a valuable consideration, without notice of the defendant's claim (*q*). Upon the same ground, a jointress may, in many cases, demur to a Bill filed against her for a discovery of her jointure deed, if the plaintiff is not capable of confirming, or the Bill does not offer to confirm, her jointure, and the facts appear sufficiently upon the face of the Bill; though, ordinarily, advantage is taken of this defence by plea (*r*).

Because the discovery sought is immaterial to the relief.

III. A defendant is not compellable to discover any thing immaterial to the relief prayed by the Bill. Upon this ground, upon a Bill filed by a mortgagor against a mortgagee to redeem, and seeking a discovery whether the mortgagee was a trustee, a demurrer to the discovery was allowed; for, as

(*m*) Smith v. Read, 1 Atk. 526.

(*n*) Harrison v. Southcote, 1 Atk. 528, 2 Ves. 389. S. C.

(*o*) Boteler v. Allington, 3 Atk. 453.

(*p*) Lord Red. 162; vide Glegg v. Legh, 4 Mad. 193.

(*q*) Jerrard v. Saunders, 2 Ves. J. 458; Sweet v. Southcote, 2 Bro. C. C. 66.

(*r*) Lord Red. 163; Chamberlain v. Knapp, 1 Atk. 52; Senhouse v. Earl, 2 Ves. 450; vide etiam, Leech v. Trollop, ib. 662; from which it appears, that a widow, is not bound to discover her jointure deed, by her answer, (even where the Bill offers to confirm it,) till the confirmation has been effected.

To the discovery.

there was no trust declared upon the mortgage deed, it was immaterial to the defendants whether there was any trust reposed in the defendants or not (*t*). So where a Bill was filed by the lord of a borough, praying, amongst other things, a discovery whether a person applying to be admitted a tenant was a trustee or not, a demurrer by the defendant was allowed (*u*); and where a bill was brought for a real estate, and sought a discovery of proceedings in the Ecclesiastical Court upon a grant of administration, the defendant demurred to that discovery, the proceedings in the Ecclesiastical Court being immaterial to the plaintiff's case (*x*). In like manner, where a Bill was filed to estab lish an agreement entered into before marriage, by which a separate estate was secured to the defendant's wife, and praying a discovery of several unkindnesses and hardships which the defendant, as it was pretended, had used towards his wife, to make her recede from the agreement, and the defendant demurred to the discovery, the demurrer was allowed (*y*). But, in general, if it can be supposed that the discovery may in any way be material to the plaintiff, in the support or defence of his suit, the defendant will be compelled to make it: thus, where a Bill called for a discovery of cases laid before Counsel, and their opinion, a demurrer to the discovery was overruled, because Lord Eldon was of opinion that although the plaintiff had no right to a discovery of the advice which the defendant had received from his counsel, and the defendant might, on that ground, have demurred to so much of the Bill as sought for a discovery of the opinions of Counsel, yet as he had demurred to the discovery of the cases, to which the plaintiff was entitled, he was bound to overrule the demurrer as covering too much (*z*).

On the ground of professional confidence.

IV. The last case brings us to the consideration of those causes of demurrer to discovery, which are the consequence of the privilege resulting from professional confidence. It was said by Lord Eldon, in the case above quoted, that there is so much objection

(*t*) Harvey v. Morris, Rep. T. Finch, 214.

(*u*) Lord Montague v. Dudman, 2 Ves. 396, 398.

(*x*) Baker v. Pritchard, 2 Atk. 388.

(*y*) Hincks v. Nelthorpe, 1 Vern. 204.

(*z*) Richards v. Jackson, 18 Ves. 472.

To the discovery.

to breaking-in upon the confidence between Counsel, or Solicitor and Client, that if it had been *res integra*, he should have been inclined not to indulge such an inquiry; this opinion is in conformity with many decisions both of this Court and of Courts of Law, the result of which has been the establishment of a rule which is strictly adhered to in all tribunals, viz,—that the confidence which a Client reposes in his Counsel, Attorney, or Solicitor, or other Professional Adviser, shall be inviolable.

Confidence between a Lawyer and his Client is inviolable,

Applies in a different degree to Legal Adviser and Client.

The privilege conferred by this species of confidence, applies, though in a different degree, to both the Legal Adviser and to the Client.

Rule in case of the Client,

The application of the rule with regard to professional confidence to discovery, required from the *Client*, has been exemplified in the case already referred to, of *Richards* v. *Jackson* (*a*), in which Lord Eldon, as we have seen, held, that if the demurrer had been confined to the discovery of the opinion, it would have been good; and it has since been extended to exempt a defendant from the discovery of the case itself, and to all confidential communications which have passed in the progress of the cause itself, and with reference to the cause previous to its being instituted (*b*); and also to letters written by a defendant to his Solicitor, after a dispute between him and the plaintiff had arisen, with the view to taking the opinion of counsel upon the matter in question, and which afterwards became the subject of the suit (*c*): 'This rule,' says Lord Brougham, 'has been adopted out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of professional assistance, a man would not venture to consult any skilful person, or would only dare

extended to all communications in the course of the cause itself, and previously to its institution.

(*a*) Ubi supra.

(*b*) Garland v. Scott. 3 Sim. 396; Bolton v. Corporation of Liverpool. ib. 467; Hughes v. Biddulph, 4 Russ. 190.

(*c*) Vent v. Pacy, 4 Russ. 193; vide etiam, Greenhough v. Gaskell, 1 M. & K. 98.

To the discovery.

Which has reference to subject of the dispute.

to tell his counsellor only half his case.' (*d*). The rule is, however, confined to those cases where the communication has a direct reference to the subject of the dispute, otherwise the *party* himself has no general privilege or protection; he is, in other respects, bound to disclose all he knows and thinks respecting his own case; and the authorities, therefore, are, that he must disclose also the cases he has laid before Counsel for their opinion, unconnected with the suit itself (*e*). "Upon this ground, also, it has been held, that although a defendant in a suit cannot be compelled to discover or produce letters, &c., between himself and his Solicitor, subsequently to the institution of the suit, and in relation thereto, yet where there are more defendants than one, he is bound to discover letters which have passed between them with reference to their defences (*f*).

Rule confined to communications with Legal Adviser and not with other parties.

Rule in case of Legal Adviser, not qualified by any reference to proceedings in the cause.

With regard to the privilege arising from professional confidence, as it respects the Legal Advisers, that is of a more extended nature,—' As it regards them, it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation. If touching matter that comes within the ordinary scope of professional employment, either from a Client or on his account and for his benefit in the transactions of his business; or, which amounts to the same thing, if they commit to paper, in the course of their employment, on his behalf, matters which they know only through their professional relation to their Client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information, or produce the papers, in any Court of Law or Equity, either as a party or as a witness. If this protection were confined to causes where proceedings had commenced, the rule would exclude the most confidential, and it may be, the most important of all communications,—those made with a view of being prepared either for instituting or defending a suit up to the instant that the process of the Court issued.' 'The protection would also

(*d*) Per Lord Brougham, Greenhough v. Gaskell, ubi supra.

(*e*) Ib. 101.

(*f*) Whitbread, v. Gurney, 1 Younge, 541.

be insufficient if it only included communication more or less connected with judicial proceedings, for a person oftentimes requires the aid of professional advice upon the subject of his rights and liabilities, with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry. It would be most mischievous, said the learned Judges in the Common Pleas (*y*), if it could be doubted whether or not an Attorney consulted upon a man's title to an estate, was at liberty to divulge a flaw' (*z*).

To the discovery.

It is to be observed, that although the general rule is, as laid down in the above case, that a Counsel or Solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge, in the conduct of professional business for a client, even though such business had no reference to legal proceedings, either existing or in contemplation; there is no doubt that the privilege will be excluded, where the communication is not made, or received professionally, and in the usual course of business, (*a*) and during the existence of the professional relation. Thus a communication made to an Attorney or Solicitor, in the character of *steward*, either before the Attorney or Solicitor was employed as such (*b*), or after his employment has ceased, will not be a protection from disclosure (*c*); and so where an Attorney had been consulted by a friend, because he was an Attorney, yet he refused to act as such; and was, therefore, applied to only as a friend (*d*), or where there could not be said, in any correctness of speech, to be a communication at all; as where, for instance, a fact became known to him, from his having been brought to a certain place by the circumstance of his being an Attorney, but of which fact any other man, if there, would have been equally conusant (*e*), or where the matter communicated was not

But applies only to such communications as are professional,

and the usual course of business,

and will not apply to mere friendly communications.

or to facts of which any other man would be equally conversant.

(*y*) Brard v. Ackerman, 2 Brod. and Bing. 6.

(*z*) Greenhough v. Gaskell, 1 M. & K. 102.

(*a*) Ibid.

(*b*) Cutts v. Pickering, 1 Ventris, 196.

(*c*) Wilson v. Rastall, 4 T. R. 753.

(*d*) Ibid.

(*e*) Doe v. Andrews, Cowp. 846; Sandford v. Remington, 2 Ves. J. 189.

To the discovery.

or where the communication is not private, or has no reference to the professional employment;

or where the Legal Adviser is a party to the transaction;

or when he has not gained his knowledge from his professional character.

in its nature private, and could in no sense be termed the subject of a confidential disclosure (*f*); or where the thing to be disclosed has no reference to the professional employment, though disclosed while the relation of Attorney and Client subsisted (*g*); in all such cases the matters to be disclosed cannot be said to be matters which the Professional Adviser has learnt by communication with his Client, or on his Client's behalf, or as matters which were committed to him in his capacity of Attorney, or which in that capacity alone he came to know (*h*); and so where an Attorney is, as it were, a party to the original transaction, as if he be the attesting witness to a deed, he may be called upon to disclose facts relating to its execution, or as to an erasure made by himself in a deed or will (*i*); and so if he was present when his Client was sworn to an answer in Chancery, he may be called upon to disclose the fact (*k*); and if he has been employed as the Steward or Agent of a party, and does not gain his knowledge of the facts as to which the discovery is required merely in his relation of Attorney to his Client, the rule will not apply, for in such cases there was no professional confidence, and he stands in the same situation as any other person (*l*).

Privilege will not extend to other Professions,

nor to agents or stewards;

nor to conveyancers, who are neither Solicitors nor Counsel;

The privilege will also be excluded, with regard to communications to members of other professions than the Law; it has, therefore, been held, not to extend to physicians or medical advisers (*m*), nor will it extend to mere agents or stewards (*n*); it, however, applies to scriveners (*o*); and also to Counsel (*p*), but it does not seem that it will extend to communications made to persons acting as conveyancers, who are neither Counsel nor Solicitors, thus in the *South Sea Company v. Dolliffe*, referred to in *Vaillant v. Dodemead* (*q*), a Mr. Gamlin is reported to have demurred to the discovery sought

(*f*) Rex v. Watkinson, 2 Stra. 1122.

(*g*) Greenhough v. Gaskell, ubi supra.

(*h*) Ibid.

(*i*) 1 Phillips on Evidence, 43.

(*k*) Ibid.

(*l*) Morgan v. Shaw, 4 Mad. 56, (n.) t.

(*m*) Duchess of Kingston's case, State Trials. Greenhough v. Gaskell, ubi supra.

(*n*) Vaillant v. Dodemead, 2 Atk. 524; Wilson v. Rastall, 4 T. R. 753.

(*o*) Harvey v. Clayton, 2 Swanst. 221, n. a.

(*p*) Rothwell v. King, 2 Swanst. 221, n. a.; Spencer v. Luttrell, ib. Stanhope v. Nott, ib.

(*q*) Ubi supra.

from him, as to the alterations in certain articles, on the ground that he was Counsel for the Company, and it is stated the demurrer was overruled, 'for that what he knew was as the conveyancer only (*r*).' It has also been held that the privilege will not apply to one who has been consulted confidentially as an Attorney, when in fact he was not one (*s*).

nor to persons consulted as Attornies, who are not in fact such.

A person who acts as interpreter (*t*) or agent (*u*) between an Attorney and his Client, stands in the same situation as the Client himself, and the rule has also been held to apply to the clerk of the Counsel or Solicitor consulted (*y*), and it is said, by the author of a book of great authority upon the subject of discovery, that the privilege extends to the representatives of the party (*z*), and it certainly seems just and reasonable that it should do so; for if the privilege is, as there is no doubt it is, the privilege of the Client, it would be very unfair upon the Client if he should be deprived of it by a circumstance over which he can have no control, viz:—the death of his professional adviser, and the transmission of his papers into the hands of his personal representative.

Privilege extends to interpreters or agents between Solicitor and Client, and to representatives of Solicitors;

V. The necessity that the Bill should show, that a certain degree of privity exists between the plaintiff and defendant, in order to entitle him to maintain his suit, has been before pointed out (*a*), and it has been stated that the want of such privity will afford a ground for demurrer to the relief prayed. It may sometimes, however, happen that a plaintiff may, by his Bill, shew that,

Because the discovery relates only to the defendant's case.

(*r*) Vaillant v. Dodemead. ubi supra.

(*s*) Fountain v. Young, 6 Esp. N. P. C. 113

(*t*) Du Barre v. Livette, Peake's N. P. C. 78; cited 4, T. R. 756.

(*u*) Parkins v. Hawkshaw, 2 Starkie N. P. C. 239.

(*y*) Taylor v. Foster, 2 C & P. 295; Foote v. Haynes, 1 C. & P. 545; 1 Ry. & M 165.

(*z*) Wigram on Discovery, 63.—In support of this proposition, the learned author of the above-mentioned work refers to Parkhurst v. Lowten, 1 Mer. 391. That case, however, does not warrant the position to the extent to which, from its position in that work, it might be inferred the learned author intended to carry it; all that is established by Parkhurst v. Lowten, with respect to the protection afforded to representatives, is that where the discovery sought would have exposed the testator to a forfeiture, and he would therefore have been entitled to protect himself from it; the executor would be entitled to the same protection, provided he has an interest in endeavouring to protect himself, and the interest is of such a nature as to afford him ground of protection.

(*a*) Ante, vol. 1, 427.

To the discovery.

supposing the facts he states are true, (and which, as we have seen, are admitted by every demurrer), he has a right to the relief he prays, and yet may not shew such a privity as will entitle him to the discovery which he asks for; for it is a rule of the Court that, where the title of the defendant is not in privity, but inconsistent with the title made by the plaintiff, the defendant is not bound to discover the evidence of the title under which he claims (*b*). Thus where a Bill was filed by a person claiming to be Lord of a Manor, against another person also claiming to be Lord of the same Manor, and praying, amongst other things, a discovery in what manner the defendant derived title to the manor, and the defendant demurred, because the plaintiff had shown no right to the discovery; the demurrer was allowed (*c*); and so where a Bill was filed by an heir, *exparte materna*; against a general devisee and executor, who had completed, by conveyance to himself, a purchase of a real estate, contracted for by the testator after the date of his will, alleging that there was no heir *exparte paterna*, but that the devisee set up a title under a release from his father, as heir *exparte paterna* of the testator, and seeking a discovery in what manner the father claimed to be heir *exparte paterna* and the particulars of the pedigree under which he claimed, a demurrer to that discovery was allowed (*d*).

Rule, that plaintiff's right of discovery is limited to facts material to his own case.

The principle upon which these cases proceed has been very clearly laid down, by a learned modern writer, to be, that the right of a plaintiff in equity to the benefit of a defendant's oath, is limited to a discovery of such material facts as relate to the 'plaintiff's' case, and does not extend to a discovery of the manner in which, or of the evidence by means of which, the defendant's case is to be established, or to any discovery of the defendant's evidence (*e*).

This principle is also very distinctly recognised by Lord Brougham, in *Bolton* v. *the Corporation of Liverpool* (*f*); and

(*b*) Ld. Red. 155; Stroud v. Deacon, 1 Ves. 37; Buden v. Dore, 2 Ves. 445; Sampson v. Swettenham, 5 Mad. 16; Tyler v. Drayton, 2 S. & S. 309, and the cases there cited.

(*c*) Ld. Red. 154; notes and cases there cited; vide etiam, Mayor of Dartmouth v. Seale, 1 Cox, 416.

(*d*) Ivy v. Kekewick, 2 Ves. J. 679.

(*e*) Wigram on Discovery, 90.

(*f*) 1 M. & K. 88. 91.

by Lord Abinger, in *Bellwood* v. *Wetherell* (*g*). It is true that in those cases the question did not come before the Court upon demurrer, but the rule is the same in whatever way the question may be raised; by demurrer, by exceptions to the defendant's answer, or by motion to produce documents in the defendant's possession; and that rule is, that *although a plaintiff has a right to a discovery or production of documents which tend to make out his own title affirmatively, he has no right to a discovery or production which are not immediately connected with his own title, and which form part of his adversary's* (*h*).

To the discovery.

It is to be observed that this rule will not extend to defeat the plaintiff of his right to a discovery from the defendant, where he makes a case in his Bill, which, if admitted, would disprove the truth of, or otherwise invalidate the defence made to the Bill; in such cases he is entitled to a discovery, from the defendant, of all which may enable him to impeach the defendant's case, as in cases of Bills to impeach a Will on the ground of fraud.—In such cases the plaintiff does not rest on a mere negative of the defendant's case, but insists upon some positive ground entitling him to the assistance of the Court, such as fraud, or other circumstances of equitable cognizance, to a discovery, of which no objection of this kind can be raised (*i*).

Will not apply when plaintiff makes a case which would disprove the defendant's case,

It may be proper also to add, that if a plaintiff is entitled to a discovery of deeds or other documents for the purpose of establishing his own case, his right to such discovery will not be affected by the circumstance that the same documents are evidence of the defendant's case also (*k*); and that if a de-

or where discovery sought is common to both,

(*g*) 1 Y. & C. 211.

(*h*) For instances in which this rule has been acted upon, where the objection has been taken by DEMURRER, vide Stroud v. Deacon, 1 Ves. 37; Ivy v. Kekewick, 2 Ves. J. 679; Glegg v. Legh, 4 Mad. 193; Compton v. Earl Grey, 1 Y. & J. 154; Wilson v. Forster, 1 Younge, 280; Tooth v. Dean and Chapter of Canterbury, 3 Sim. 49. ——— ON MOTION to PRODUCE, Princess of Wales v. Earl of Liverpool, 1 Swanst. 114; Micklethwait v. Moore, 3 Mer. 292; Bligh v. Benson, 7 Price, 205; Tyler v. Drayton, 2 S. & S. 309; Sampson v. Swettenham, 5 Mad. 16; 2 M. & K. 754 (n. b.) Firkins v. Low, 13 Price, 193; Wilson v. Forster, M'Lel. & Young, 274; Tomlinson v. Lymer, 2 Sim. 489; vide etiam, Hobson v. Warrington, 3 P. Wms. 35; Davers v. Davers, 2 P. Wms. 410; Burton v. Neville, 2 Cox, 242; Shaftsbury v. Arrowsmith, 4 Ves. 66; Aston v. Ld. Exeter, 6 Ves. 288; Worsley v. Watson, cited ib. 289; Bolton v. The Corporation of Liverpool, 1 M. & K. 88. On EXCEPTIONS TO ANSWERS, Buden v. Dore, 2 Ves. 445.

(*i*) Hare on Discovery, 201.

(*k*) Burrell v. Nicholson, 1 M. & K. 680; Wigram on Discovery 50.

To the discovery.

fendant, bound to keep distinct accounts for another party, improperly mixes them with his own, so that they cannot be separated, he must discover the whole (*l*).

Because a third party has an interest in a document sought to be produced;

VI. The circumstance that a party not before the Court has an interest in a document which a defendant, so far as his own interest is concerned, is bound to produce, will, in some cases, deprive the plaintiff of his right to call for its production, at least in the absence of the third party, as in the instance of a person being a trustee only for others. Upon this principle, a mortgagee cannot be compelled to shew the title of his mortgagor, unless such mortgagor is before the Court (*m*): in such cases, however, a demurrer, for want of proper parties, would be the proper form in which to raise the objection, where the Bill is for relief as well as for a discovery.

The above are the principal grounds upon which a defendant may demur to the discovery sought by a Bill, although the plaintiff may be entitled to the relief he prays, in case he can establish a right to it by other means than a discovery from the defendant, on those points as to which the defendant is entitled to defend himself from making a discovery; in all other cases, a plaintiff, if entitled to relief, is entitled to call upon the defendant to make a full discovery of all matters upon which his title to relief is founded. It does not, however, very often happen that these grounds affect the whole of the discovery sought; thus, as we have seen, a man is bound to answer to the fact of trading, although he is not bound to answer whether he has committed an act of bankruptcy (*n*); in such cases the defendant must answer all those parts of the Bill, the answer to which will not expose him, or have a tendency to expose him, to the inconveniences before enumerated; a demurrer, under such circumstances, should precisely distinguish each part of the Bill demurred to, and if it does not do so it will be overruled (*o*).

(*l*) Freeman v. Fairlie, 3 Mer. 35; Earl of Salisbury v. Cecil, 1 Cox, 277; Wigram, 59; Hare on Discovery, 245.

(*m*) Lambert v. Rogers, 2 Me. 483.

(*n*) Chambers v. Thompson, 4 Bro. C. C. 434.

(*o*) Chetwynd v. Lindon, 2 Ves. 450; Devonsher v. Newenham, 2 Sch. and Lef. 199.; Robinson v. Thompson, 2 V. & B. 118; Wetherhead v. Blackburn, 2 V. & B. 121, 124.

To the discovery, where a particular discovery may be objected to, it may be done by answer.

It may be noticed here that if a defendant objects to a particular discovery, and the grounds upon which he may demur appear clearly on the face of the Bill, and the defendant does not demur to the discovery, but answering to the rest of the Bill declines answering to so much, the Court will not compel him to make the discovery (*n*); but in general, unless it clearly appears by the Bill, that the plaintiff is not entitled to the discovery he requires, or that he ought not to be compelled to make it, a demurrer to the discovery will not hold, and the defendant must protect himself either by plea or answer (*o*).

For irregularity in the frame of the Bill.

In addition to the above-mentioned causes of demurrer it may be stated, that any irregularity in the frame of a Bill, of any sort, may be taken advantage of by demurrer. Thus, if a Bill is brought, contrary to the usual course of the Court, a demurrer will hold (*p*); as where, after a decree directing incumbrances to be paid according to priority, a creditor obtained an assignment of an old mortgage, and filed a Bill to have the advantage it would give him, by way of priority, over the demands of some of the defendants, a demurrer was allowed (*q*), it being in effect a bill to vary a decree, and yet was neither a Bill of review, nor a Bill in the nature of a Bill of review, which are the only kinds of Bills which can be brought to affect or alter a decree, unless the decree has been obtained by fraud; where, however, a supplemental Bill was filed in a case in which, according to the former practice of the Court, a supplemental Bill was the proper course; but by more recent practice the same object had been accomplished by petition, the Vice-Chancellor (Sir J. Leach,) held that the supplemental Bill was not rendered irregular by the present practice, although the circumstances would be taken into consideration upon the question of costs (*r*).

To amended Bills.

If an irregularity arises in any alteration of a Bill, by way of amendment, it may also be taken advantage of by de-

(*n*) Ld. Red. 163; Wrottesley v. Bendish, 3 P. Wms. 235; Parkhurst v. Lowten, 1 Mer. 401.

(*o*) Ld. Red. 163.

(*p*) Ld. Red. 168.

(*q*) Wortley v. Birkhead, 3 Atk. 809.

(*r*) Davies v. Williams, 1 Sim 5.

To amended Bills.

murrer (*t*), as if a plaintiff amends his Bill and states a matter, arisen subsequent to the filing of the Bill, which consequently ought to be the subject of a supplemental Bill, the defendant may demur (*u*). If, however, a matter which has arisen subsequent to the filing of the original Bill, and is properly the subject of supplemental Bill, is stated by amendment, and the defendant answers the amended Bill, it is too late to object to the irregularity at the hearing (*v*); unless the defendant has claimed the same benefit by his answer which he would have been entitled to had he demurred to the amended Bill, in which case, as we have seen, he will be entitled to the benefit of the objection at the hearing (*x*).

May be on the same grounds as demurrers to original Bill.

With respect to demurrers to amended Bills in general, it has been before stated, that an amended Bill is liable to have the same objections taken to it, by demurrer, as an original Bill; and that, even where a demurrer to the original Bill has been overruled, a demurrer to an amended Bill has been allowed (*y*); and the circumstance of the amendment being of the most trifling extent, will not, it seems, make any difference; and, even where the Bill was amended by the addition of a party only, the demurrer was held to be regular (*z*). The rule is also the same where the defence first put in is a plea, and the Bill is afterwards amended, the amended Bill may still be demurred to (*a*). A defendant, however, cannot, after he has answered the original Bill, if the plaintiff amends it, put in a general demurrer to the whole Bill; because the answer to the original Bill, being still on the record, will, in fact, overrule the demurrer (*b*). The defendant must, in such case, confine his demurrer to the matters introduced by amendment; and it is to be observed

After demurrer to original Bill has been overruled.

After answer to original Bill, defendant cannot demur to the whole amended Bill;

(*t*) Lord Red. 168; vide etiam, Lady Granville v. Ramsden, Bunb. 56.

(*u*) Brown v. Higden, 1 Atk. 291; ante vol. 1, 510.

(*v*) Archbishop of York v. Stapleton, 2 Atk. 136.

(*x*) Ante, v. 1. 511; vide etiam Milligan v. Mitchell, M. & C. 433. The cases in which a plaintiff may introduce matter occurring since the filing of the original Bill by amendment, are pointed out, ante, vol. 1, 511.

(*y*) Ante, vol. 1, 550; Bancroft v. Wardour, 2 Bro. C. C. 66; 2 Dick. 672. S. C.

(*z*) Bosanquet v. Marsham, 4 Sim. 573.

(*a*) Robertson v. Ld. Londonderry, 4 Sim. 226.

(*b*) Atkinson v. Hanway, 1 Cox, 360; in which case the demurrer was taken off the file for irregularity. Sed quere?

that where a defendant means to demur only to such parts of the amended Bill as have been introduced by the amendment, he must specify the particular parts demurred to, and it will not be sufficient to demur 'as to so much as has not been answered in the answer to the original Bill' (*c*).

To amended Bills.

It has been before stated, with regard to demurrers to the discovery, where the ground of demurrer does not affect the whole of the discovery sought, that part which will not expose the defendant to the inconveniences which render it improper that he should be called upon to make the discovery, must be answered. The same rule extends to demurrers in general; for, in complicated cases, such as usually come under the cognizance of Courts of Equity, it frequently happens that a plaintiff may shew a right to part only of the relief or discovery which he asks for, in which case the rules of the Court permit the defendant to confine his answer to that part, as to which, if true, the plaintiff would have a right to the interference of the Court, and to defend himself as to the rest by a partial demurrer.

Of partial demurrers.

The necessity for the defendant's having it in his power to adopt such a course of proceeding, is shewn by the fact of its having been repeatedly determined to be a rule of the Court that a demurrer cannot be good in part and bad in part (*d*); and that if a demurrer is general to the whole Bill, and there is any part, either as to the relief or the discovery, to which the defendant ought to put in an answer, the demurrer being entire must be overruled (*e*).

Demurrer cannot be good in part and bad in part.

Instances are, certainly, mentioned, by Lord Redesdale (*f*), in which demurrers have been allowed in part; but whatever may have been done formerly, the practice appears to be now more strict, though sometimes the Court will, upon overruling a de-

Of amending demurrers.

(*c*) Mynd v. Francis, 1 Anst. 6

(*d*) In this respect there is a difference between a plea and a demurrer; Mayor, &c. of London v. Levy, 8 Ves. 403; Baker v. Mellish, 11 Ves. 7[illegible].

(*e*) Per Lord Hardwicke, in Metcalf v. Harvey, 1 Ves. 248; Earl of Suffolk v. Green, 1 Atk. 450; Todd v. Gee, 17 Ves. 273; Attorney-General v. Browne, 1 Swanst. 304.

(*f*) Ld. Red 178; Rolt v. Lord Somerville, 2 Eq. Ca. Ab. 759; Radcliffe v. Fursman 2 Bro. P. C. 514.

Partial demurrer.

In what case leave will be given to put in less extended demurrer.

murrer, give the defendant leave to put in a less extended demurrer; or, if a fair case is made, to amend and narrow the demurrer already filed (*f*). In the latter case, however, the application to amend must be made before the judgment upon the demurrer, as it stands, has been pronounced (*g*); but even where that has been omitted, the Court will, after the demurrer has been allowed, upon a proper case being shewn, give the defendant leave, upon motion, to put in a less extended demurrer and answer (*h*).

To distinct parts of the Bill.

A defendant may also put in separate demurrers to separate and distinct parts of a Bill, for separate and distinct causes (*i*); for the same grounds of demurrer, frequently, will not apply to different parts of a Bill, though the whole may be liable to demurrer; and in this case one demurrer may be overruled, upon argument, and another allowed (*k*).

Demurrer may be good as to one defendant and bad as to another.

It is to be noticed, that although a demurrer cannot be good in part and bad in part, it may be good as to one of the defendants demurring, and bad as to others (*l*).

Sect. III.

Of the Form of Demurrers.

Title of a demurrer.

A demurrer is usually intitled 'The demurrer of A. B., (or of A. B. and C. D.) to the Bill of Complaint of (E. F).' If it be accompanied by a plea, or by an answer, it should be called in the title 'the *demurrer and plea*, or *demurrer and answer*.' Where it is to an amended Bill, it need not be expressed, in the title, to be a demurrer to the original and amended Bill; but a demurrer to the amended Bill will be sufficient (*m*).

Commences with a protestation.

As a demurrer confesses the matters of fact to be true, as stated by the opposite party, it is always preceded by a general protestation against the truth of the matters contained in the

(*f*) Baker v. Mellish, 11 Ves. 68; Thorpe v. Macauley, 5 Mad. 318.

(*g*) Baker v. Mellish, 11 Ves. 72.

(*h*) Ibid.

(*i*) Lord Red. 174; North v. Earl of Strafford, 3 P. Wm. 148; Roberdeau v. Rous, 1 Atk. 544.

(*k*) North v. Earl of Strafford, ubi supra.

(*l*) Mayor, &c., of London v. Levy, 8 Ves. 403.

(*m*) Smith v. Bryon, 3 Mad. 428.

Bill, a practice borrowed from the Common Law, and probably intended to avoid conclusion in another suit (*n*), or in the suit in which it is put in, in case the demurrer should be overruled.

To part of the Bill.

After the protestation, the demurrer, where it is not to the whole Bill, proceeds to point out the parts of the Bill to which it is intended to apply. The rule, as to this, is very clearly laid laid down by Lord Redesdale, in *Devonsher* v. *Newenham* (*o*). 'It has been repeatedly said, that where a defendant demurs to part, and answers to part of a Bill, the Court is not to be put to the trouble of looking into the Bill or answer, to see what is covered by the demurrer; but that it ought to be expressed in clear and precise terms, what it is the party refuses to answer, so that the Master, upon a reference to him upon exceptions, should be able to ascertain, precisely, how far the demurrer goes, and what is to be answered. And I cannot agree, that it is a proper way of demurring to say that the defendant answers to such a particular fact, and demurs to all the rest of a Bill; for this would put the Master to great difficuity in saying what was demurred to, and whether the answer was sufficient or otherwise. The defendant ought to demur to a particular part of the Bill, specifying it precisely' (*p*).

When to part of the Bill only.

Answer to a particular part of a Bill and demurrer, as to the rest bad,

It is to be noticed that although a demurrer, in the form above stated, viz. 'to all the rest of the Bill which is not answered,' would, for the reasons stated by Lord Redesdale, be a bad form of demurrer; a demurrer to all the Bill, except as to a particular specified part would not be open to the same objection; and where the exception applies to a very small part only of the Bill, it has been held to be the best way of demurring (*q*). In framing such a demurrer, however, care must be taken that it should appear distinctly by the demurrer itself, what part of the Bill is to be included in the exception; for if it should be necessary to refer to the answer, for the purpose of ascertaining it, the demurrer will be bad. Thus in *Robin-*

demurrer to all the bill except a particular part specified good.

Part demurred to must appear distinctly.

(*n*) Ld. Red. 172.
(*o*) 2 Sch. & Lef. 199, 205.
(*p*) Chetwynd v. Lindon, 2 Ves. 450; Salkeld v. Science, ib. 107.
(*q*) Hicks v. Raincock, 1 Cox, 40; vide etiam, Howe v. Duppa, 1 V. & B. 511.

To part of the Bill only.

son v. *Thompson* (*r*), where the defendant demurred as to all the relief, and all the discovery sought by the Bill, so far as the Bill sought a discovery '*touching*' the several title deeds or instruments, whereby the entails in the Bill mentioned were respectively alleged 'to have been created,' and also excepting certain other matters specifically stated; and as to the rest of the Bill, not demurred to, &c. the defendant proceeded to answer, Sir Tho. Plumer held the demurrer to be bad, because it would be necessary, in order to determine the extent of the demurrer, and to ascertain what was comprised in the vague expression, 'the residue of the Bill,' to go through the whole record, involving a long title, as to all touching which the defendant professes to answer, and laying the Master under the same difficulty upon exceptions.

The best rule for guiding the pleader in framing a partial demurrer, so as to point out, with sufficient distinctness, the parts intended to be demurred to, is, perhaps, to consider in what manner he would, supposing the demurrer to be allowed, proceed, on behalf of the plaintiff, to frame exceptions to the answer for insufficiency. If he should find that his demurrer is so framed that the question, whether any part of the Bill which may afford a ground for exceptions, be covered by a demurrer or not, would be open to doubt or argument, either in the mind of the Master or of the Court, his demurrer will be informal. If, on the other hand, he should find that he can clearly point out, by his exceptions, any part of the Bill which he considers as unanswered, without any doubt being likely to arise as to whether that part is covered by the demurrer or not, the demurrer will be good in point of form, whether it points out the part demurred to, by exception or by specific statement.

Where two or more demurrers they must point out the part covered by each.

The same rule will apply to cases where there are two or more distinct demurrers to different portions of the Bill; in such cases the different portions of the Bill to be covered by each demurrer, must be distinctly pointed out. And where a demurrer is put in to such parts of an amended Bill, as have been introduced by the amendments, it will not be sufficient

Practice where demurrer is to amendments only.

(*r*) 2 V. & B. 118.

to say it is a demurrer to the amendments, but the parts must be specifically pointed out, and a demurrer to so much of the amended Bill, as has not been answered by the answer to the original Bill, will be bad (*g*).

Special demurrers.

A demurrer will not be good if it merely says, generally, that the defendant demurs to the Bill (*h*); it must express some cause of demurrer, either general or specific: a defendant is said to demur *generally*, when he demurs to the jurisdiction, or to the substance of the Bill; or *specially*, when he demurs on the ground of a defect in form. He may, however, in cases where he demurs either to the jurisdiction or to the substance, state specially the particular grounds upon which he founds his objection; and indeed some of the grounds of demurrer, which go to the substance of the Bill, require rather a particular statement; thus a demurrer, for want of parties, must, as has been before stated, shew who are the necessary parties, in such a manner as to point out to the plaintiff the objection to his Bill, so as to enable him to amend by adding proper parties (*i*); and in the case of a demurrer for multifariousness, a mere allegation, 'that the Bill is multifarious,' will be *informal;* it should state, as the ground of demurrer, that the Bill unites distinct matters upon one record, and shew the inconvenience of so doing (*k*).

Must express the causes of demurrer.

Special demurrers.

It is also to be observed, that some objections, which appear to be merely upon matters of form, may be taken advantage of under general demurrers, for want of equity; thus it has been before stated, that some Bills may be demurred to on the ground that they are not accompanied by an affidavit; that objection, however, is in fact an objection to the Equity, because the cases in which an affidavit is required, are those in which the Court has no jurisdiction, unless upon the supposition that the fact stated in the affidavit is true; and the Court requires the annexation of the affidavit to the Bill, for the purpose of verifying that fact; and so in those cases in which a

(*g*) Ante, p. 67.

(*h*) Duffield v. Graves, Cary, 87; Offley v. Morgan, ib. 107; Peachey v. Twycross, ib. 113. Beame's Ord.

(*i*) Ante, v. 1, 385.

(*k*) Rayner v. Julian, 2 Dick. 677; 5 Madd. 144, (n.) b. S. C.

Special.

demurrer will lie because the plaintiff's right is not stated to have been first established at Law, it is because the ground of the Court's interference is the fact that the legal title of the defendant has been established in some proceeding in a Court of ordinary jurisdiction. In all these cases, the objection may be made either in the form of a special demurrer or of general demurrer for want of Equity; because the plaintiff, by his Bill, does not bring his case within the description of cases over which the Court exercises jurisdiction. Upon the same principle, a defendant may take advantage, by general demurrer, of the omission to offer to do equity in cases where such an offer ought to be made. The objection for want of sufficient positiveness in the defendant's statement of facts, within his own knowledge, may also be taken by general demurrer (*j*).

Demurrer to discovery only must be special.

It is to be observed, that where a defendant to a Bill praying relief, demurs to the discovery only, he cannot do so under a general demurrer for want of Equity, he must make it the subject of special demurrer (*k*).

Speaking demurrers.

Care must be taken, in framing a demurrer, that it is made to rely only upon the facts stated in the Bill, otherwise it will be what is termed a *speaking demurrer*, and will be overruled (*l*). Thus where a Bill was filed to redeem a mortgage, alleging that the plaintiff's ancestor had died in 1770, and that, *soon after*, the defendant took possession, &c.; and the defendant demurred, and for cause of demurrer shewed, that it appeared, upon the face of the Bill, that from the year 1770, *which is upwards of twenty years before the filing of the Bill*, that the defendant has been in possession, &c., Lord Thurlow overruled the demurrer, because the language of the Bill did not shew that the defendant took possession in the year 1770, but that he did so could only be collected from the averment in the demurrer (*m*). It is material to notice that, in order to constitute a speaking demurrer, the fact or averment introduced must be one which is necessary to support the demurrer, and

(*j*) Ante, Vol. I. 481.

(*k*) Whittingham v. Burgoyne, 3 Anst. 900.

(*l*) Brownsword v. Edwards, 2 Ves. 245.

(*m*) Edsell v. Buchannan, 4 Bro. C. C. 254. 2 Ves. jun. 83. S. C.

is not found in the Bill; the introduction of *immaterial* facts, or averments, or of arguments, is improper, but it is mere surplusage, and will not vitiate the demurrer (*n*).

Of demurring *ore tenus.*

Several causes of demurrer may be assigned.

A defendant is not limited to shew one cause of demurrer, only, he may assign as many causes of demurrer as he pleases, either to the whole Bill, or to each part of the Bill demurred to, and if any one of the causes of demurrer assigned hold good, the demurrer will be allowed (*o*). A defendant may, even at the hearing of his demurrer, orally assign another cause of demurrer, different or in addition to those assigned upon the record, which, if valid, will support the demurrer, although the causes of demurrer, stated in the demurrer itself, are held to be invalid. This oral statement of a cause of demurrer, at the Bar, is called demurring *ore tenus.*

Of demurrers *ore tenus.*

Must be co-extensive with demurrer on record.

It is to be noticed that, although a defendant may, either upon the record or *ore tenus*, assign as many causes of demurrer as he pleases, such causes of demurrer must be *co-extensive* with the demurrer upon the record; therefore, causes of demurrer, which apply to part of the Bill only, cannot be joined with causes of demurrer which go to the whole Bill (*p*); for, as we have seen before, a demurrer cannot be good in part and bad in part, which would be the case if a demurrer, professing to go to the whole Bill, could be supported by the allegation of a ground of demurrer which applies to part only.

Whether after a partial demurrer overruled, an *ore tenus* demurrer will hold to the same part? Q.

It appears to have been the opinion of Sir W. Alexander, L. C. B., that after a demurrer to part of a Bill has been overruled, a demurrer *ore tenus* to the same part cannot be allowed (*q*); but, in a recent case, where a Bill was filed to restrain the defendant from setting up outstanding terms upon the trial of certain actions of ejectment, which the plaintiff intended to bring for the purpose of recovering possession of the property in dispute, and the defendant pleaded as to so much of the Bill as sought any relief on account of the outstanding terms, that

(*n*) Cawthorn v. Chalie, 2 S. & S. 127; Davies v. Williams, 1 Sim. 5.

(*o*) Harrison v. Hogg. 2 Ves. J. 323; Jones v. Frost, 3 Mad. 1. Jac. 466. S. C.

(*p*) Pitts v. Short, 17 Ves. 213, 216. Metcalf v. Brown, 5 Price, 560.

(*q*) Shepherd v. Lloyd, 2 Y. & J. 490.

Ore tenus.

there was no such term; and, as to the rest of the Bill, demurred, because the plaintiff had not, by his Bill, shewn that he was entitled to the estate; Lord Langdale, M. R. overruled the demurrer on record; because although it professed to cover part of the Bill only, it was in fact a demuurrer to the whole Bill, and was consequently overruled by the plea; but he allowed a demurrer by the defendant, *ore tenus,* for want of equity as *to so much of the Bill as was not covered by the plea* (*r*). It is to be observed, that the allowance of this demurrer is no departure from the rule above laid down; for the demurrer on record, although in effect extending to the whole Bill, was in words applied to that part only of the Bill which was not covered by the plea, to the whole of which part the demurrer, *ore tenus,* was applicable; so that, in fact, the demurrer on record, and the *ore tenus* demurrer, were co-extensive; and certainly there does not appear to be any reason why the course pursued by the Master of the Rolls should not be adopted in similar cases, in preference to that of the Court of Exchequer, since the only inconvenience in general likely to result from allowing a partial demurrer, *ore tenus,* must be the difficulty of pointing out the precise part of the Bill to which the demurrer is applicable; an inconvenience which may result when the original demurrer is to the whole Bill, and the demurrer at the bar is to part only; but which cannot possibly be felt when the original demurrer is to part only, and the demurrer *ore tenus,* is to the same part.

Demand of judgment.

The demurrer, having assigned the cause or causes of demurrer, then proceeds to demand judgment of the Court, whether the defendant ought to be compelled to put in any further or other answer to the Bill, or to such part thereof, as is specified as being the subject of demurrer, and concludes with a prayer that the defendant may be dismissed with his reasonable costs in that behalf sustained. It is to be observed, that where a defendant demurred to the whole Bill, and prayed the judgment of the Court, 'whether he should be compelled to put in any further or other answer to the said Bill, *or to any part*

(*r*) Crouch v. Hickin, 1 Keen. 385.

thereof;' and it was objected that such form of the demurrer was untenable, as it amounted to a general demurrer to part only of the Bill; the Court of Exchequer considered the conclusion as admitting that the plaintiff was entitled to some answer, and therefore overruled the demurrer (*t*).

Where coupled with an answer.

In what cases coupled with answer.

When a demurrer is to part of the Bill only, the answer to the remainder usually follows the statement of the causes of demurrer and the submission to the judgment of the Court of the plaintiff's right to call upon the defendant to make further or other answer. But as a demurrer demands the judgment of the Court, whether the defendant shall make further or other answer to the Bill, or to that part of the Bill which he has demurred to, it would be inconsistent if the defendant were to be permitted, after making such submission, to answer the Bill, or that part of it which is intended to be covered by the demurrer (*u*). It has, therefore, been adopted as an invariable rule, that an answer to any part of a Bill demurred to will overrule the demurrer (*x*), even though the part answered be immaterial (*y*); therefore, where a defendant demurred, 'for that the plaintiff had made no title by his Bill,' and answered several parts of the Bill, the demurrer was held to be overruled by the answer (*z*), upon the same principle as we have seen before, where a defendant had answered the original Bill, and, upon the plaintiff's amending the Bill, put in a general demurrer to the whole Bill, the demurrer was held to be overruled by the answer to the original Bill, which still remained on the record (*a*), and the case is the same where a defendant pleads as well as answers to the part demurred to; for a plea is nothing but an answer, and sworn to as such (*b*). In this respect there appears to be no distinction between Bills for relief and Bills for discovery only (*c*), and it seems to make no

In what cases demurrer will be overruled by answer.

(*t*) Metcalf v. Brown, 5 Price, 560.

(*u*) Jones v. Earl of Strafford, 3 P. Wms., 81.

(*x*) Tidd v. Clare, 2 Dick, 81. Hester v. Weston, 1 Vern. 463. Roberts v. Clayton, 3 Anst. 715.

(*y*) Ruspini v. Vickery, cited Ld. Red. 172.

(*z*) Savage v. Smalebroke, 1 Vern. 90.

(*a*) Atkinson v. Hanway, 1 Cox, 360.

(*b*) Jones v. Earl of Strafford, *ubi supra*.

(*c*) Corbett v. Hawkins, 1 Y. & J. 421.

Where coupled with an answer.

difference if the defendant except the part, which he proposes to answer, from the part demurred to, either by pointing out the part demurred to in the usual form, or by demurring to all the Bill except the particular part answered. Yet if the part answered is a part which ought to have been covered by the demurrer, the demurrer will be overruled; therefore, where a Bill was filed to set aside an award, charging fraud and corruption in the arbitrator, and the defendant demurred to the whole Bill, except the charges of fraud and corruption, the Vice-Chancellor, Sir J. Leach, held that, under the circumstances, (it having been stipulated by the agreement for the reference that the submission should be made a rule of Court,) the Court had no jurisdiction over the award by Bill, and that the plaintiff ought to proceed summarily under the statute; the consequence of which was, the demurrer ought to have extended to the whole Bill: he therefore held, that the answer to the charges of fraud and corruption overruled the demurrer (*d*). And so it has been held, that if a man demurs 'for that the Bill contains several matters not relating to one another, and in some whereof the defendant is not concerned,' if by answer the defendant doth more than barely deny the combination and confederacy, he overrules his demurrer (*e*).

Demurrers for multifariousness not overruled by answering charges of confederacy.

It may, at the first view of the case, be supposed that the rule which has been before laid down, that a general demurrer to the relief will not preclude a defendant from answering to the discovery in those cases in which, supposing the Bill to have been a Bill for a discovery only, the plaintiff would have been entitled to compel an answer (*f*), is somewhat at variance with the propositions above stated. The operation of that rule, however, has been confined to those cases only in which the plaintiff, by his Bill, made a case which gave him a clear right to a discovery, in aid of proceedings at law, although he had added a prayer for relief, to which he was not entitled in a Court of Equity; and it was, consequently, for the advantage of the plaintiff, that no inconvenience should result to a defendant,

Rule, that answer overrules demurrer not applicable where demurrer to relief only.

(*d*) Dawson v. Sadler, 1 S. & S. 537. Vide etiam. Sherwood v. Clark, 9 Price, 259. S. C. as to the necessity of answering this charge where defendant demurs for multifariousness. Vide ante, p. 42.

(*e*) Hester v. Weston, 1 Vern. 463. 1 Eq. Ca. Ab. 40. Pl. 3.

(*f*) Ante, p. 25.

who, under such circumstances, gave the discovery required, and thereby saved the plaintiff from the expense and inconvenience of filing another Bill. The rule afforded by these cases, therefore, can only be considered as an exception to the general principle, and cannot be construed to authorize a defendant in putting in a demurrer to a Bill praying equitable relief, which the facts stated do not authorize, and at the same time burthening the plaintiff with the expense of an answer to which, if the demurrer is well founded, could not by any possibility be of use to him. Such a proceeding would be open to the charge of inconsistency in a greater degree than a partial answer to such a Bill, and would, moreover, be oppressive to a plaintiff.

Where coupled with an answer.

For information as to the nature of the answer to be put in to those parts of the Bill to which the defendant does not demur, the reader is referred to the chapter on Answers. It is, however, to be observed here, that if the plaintiff conceives that the defendant has not sufficiently answered that portion of his Bill, he may except to the answer, but he must not do so before the demurrer has been argued (*g*), otherwise he will admit the demurrer to be good (*h*). It is said, however, that if the demurrer is to the relief only, and not to any part of the discovery, the plaintiff may take exceptions to the answer before the demurrer is argued (*i*).

Nature of answer.

Must not be excepted to before demurrer argued.

Secus where demurrer is only to relief.

A demurrer must be signed by Counsel, but is put in without oath, as it asserts no fact, and relies merely upon matter apparent upon the face of the Bill (*k*).

Demurrer must be signed by Counsel.

(*g*) London Assurance Company v. East India Company, 3 P. Wms. 326.

(*h*) Lord Red. 256. Vide Boyd v. Mills, 13 Ves. 85.

(*i*) Ibid, cited 3 P. Wms 327. (n.) S.

(*k*) Lord Red. 169.

Sect. IV.

Of Filing, Setting Down, and Hearing Demurrers.

How filed.

After the draft of the demurrer has been settled and signed, it is to be fairly engrossed on parchment and carried to the defendant's Clerk in Court to be filed.

It seems to be necessary that a separate demurrer, by a married woman, should have an order to warrant it; such a demurrer ought not, therefore, to be filed till an order to that effect has been procured (z).

Within what time.

Under the old practice.

It was formerly considered that, as a demurrer relies merely upon matters appearing upon the face of the Bill, the defendant might, by advice of Counsel, upon sight of the Bill only, be enabled to demur thereto, for this reason, the Court always made it a special condition of any order, giving the defendant time to demur, plead, or answer to the plaintiff's Bill, that he should not demur alone (a). The effect of this rule was, that in ordinary cases, a defendant could not put in a demurrer to the whole Bill after the original time given by the rules of the Court for putting in his answer; viz., eight days from his appearance, inclusive of the day of appearance, had expired. For as, after the expiration of the eight days, the defendant, unless he had obtained an order for time, was considered to be in contempt, and liable to be attached, and no demurrer could, as we have seen, have been filed by a party in contempt to an ordinary attachment (b), his time for demurring was necessarily limited to the eight days, unless by the courtesy of the plaintiff's Clerk in Court, there had been a delay in issuing the attachment, in which case, if the attachment had not been sealed he might have put in his demurrer, a party not being considered actually in contempt till the attachment has been sealed (c). This rule, till the recent alterations in the practice, was adhered to with great strictness, but the inconveniences likely to arise from too strict

Under the New Orders.

(z) Barron v. Grillard, 3 V. & B 165

(a) Ld. Red. 170.

(b) Ante, vol. 1, 658. Mellor v. Hall, 2 S. & S. 321.

(c) Ante, vol. 1, 659.

Of filing.

a regard to it, were forcibly pointed out by Lord Redesdale in his treatise (*d*); and, by a recent order it has been provided, " That in every case where an original or supplemental Bill, or Bill of revivor shall be filed, a defendant shall, after appearance and without order, be allowed eight weeks in a town cause, and ten weeks in a country cause, to plead, answer, or demur, not demurring alone, to any such original or supplemental Bill, or any such Bill of revivor, to which answer is required; and five weeks in a town cause, and seven weeks in a country cause, to plead, answer, or demur, not demurring alone, to any amended Bill to which the plaintiff shall require an answer, *but that twelve days only shall be allowed a defendant to demur alone to any such original, or amended, or supplemental Bill, or Bill of revivor* (*e*). Under this order, therefore, a defendant has, in all cases, twelve days in which to file his demurrer, without reference to any question of contempt.

It appears that, under the old practice, the court would, in certain special cases, allow a defendant to put in a demurrer to the whole Bill, even after he had obtained an order for time (*f*): no case of an application for such a purpose, appears to have occurred since the new orders were promulgated; it is presumed, however, that if any motion to that effect were now to be made, it would be successful; provided the circumstances were such as would have induced the Court to accede to it under the old system. What these circumstances are may be collected from what was said by the Vice-Chancellor (Sir T. Plumer,) in *Bruce* v. *Allen* (*g*). ' In a special case, the Court will grant such a motion as this. By a special case, I mean some peculiar circumstance, as surprise; it not being sufficient, in such a case as this, to show, on the merits of the case, that a demurrer was proper; for it appeared proper in the cases cited (*h*), though in them the motion was denied.'

According to the present practice of the Court, therefore, if a defendant, after the expiration of twelve days from the time

(*d*) Ld. Red. 170.
(*e*) Ord. 21 Dec. 1833 X.
(*f*) Bruce v. Allen, 1 Madd. 556.
(*g*) Ubi supra.
(*h*) Taylor v. Milner, 10 Ves. 444; Dolder v. Lord Huntingfield, 11 Ves. 283.

Of filing.

If filed after twelve days from appearance may be taken off the file.

of his appearance, puts in a demurrer to the whole Bill without a special order for that purpose, he is guilty of an irregularity, and the plaintiff may, upon application to the Court by motion, obtain an order to take the demurrer off the file and oblige the defendant to pay the costs of his proceeding (*i*).

In fact, by the above order, a defendant, after the twelve days which he is thereby allowed for putting in a demurrer, is placed in exactly the same situation that he would have been in under the old practice, had he obtained an order for 'time to plead, answer, and demur, not demurring alone.' In order, therefore, to understand what will be a defendant's situation with regard to demurring after the expiration of the twelve days from his appearance, it will be necessary to see what, under the old practice of the Court, would have been considered as a compliance with the terms of the order 'to plead, answer, or demur, *not demurring alone*.'

What will be a sufficient compliance with the condition not to demur alone.

Lord Redesdale says, that the condition that the defendant shall not demur alone, ought not to be considered literally (*k*); and that it has been formerly said, that the Court will not incline to discharge a demurrer, if the defendant denies combination only where he cannot answer further without overruling his demurrer (*l*). However, the modern practice has been according to the original strictness of the rule, and it has been considered that where a defendant has been under an order which obliged him to plead, answer, or demur, not demurring alone, he must, if he is advised to demur, annex to his demurrer, a plea or answer to some part of the Bill (*m*). It has, however, been determined that a mere denial of combination does not amount to a compliance with the order, and therefore a demurrer, accompanied by such an answer, has, upon motion, been taken off the file (*n*). With respect to the extent of the answer which will be considered as a sufficient compliance

(*i*) Dyson v. Benson, Coop. Rep. 110.

(*k*) Lord Red. 171.

(*l*) Ibid, and vide Done v. Peacock, 3 Atk. 726.

(*m*) Lord Red. 170.

(*n*) Ib.; Stephenton v. Gardiner, 2 P. Wms. 286; Lee v. Pascoe, 1 Bro. C. C. 78; Kenrick v. Clayton, 2 Bro. C. C. 214; 2 Dick, 685, S. C.; Lansdown v. Elderton, 8 Ves. 526; Tomkin v. Lethbridge, 9 Ves. 178; Taylor v. Milner, 10 Ves. 446; Wetherhead v. Blackburn, 2 V. & B. 123.

Of filing.

with the order not to demur alone, it may be observed, that in *Tomkin* v. *Lethbridge* (*o*), which was a Bill for a discovery, the answer gave no information, but simply stated the death of a person, and denied combination, and Lord Eldon said that according to the practice of the Court, if the defendant had been under the order not to demur alone, the addition of this short answer would have saved the terms of that order (*p*). But though an answer as to a single fact will be a sufficient compliance with the condition, such fact must not be one which is covered by the demurrer, otherwise the demurrer will be overruled by the answer (*q*).

Demurrer may be filed after injunction.

It may be noticed here, that, although, by the 10th of Lord Brougham's Orders, a defendant has twelve days within which he may demur to the Bill, the plaintiff may, if no demurrer is filed within eight days after appearance, obtain a common injunction. Such injunction, however, will not prevent the defendant from filing his demurrer, provided he does so within the twelve days allowed for that purpose by the order (*qq*).

Demurrer and answer filed after attachment taken off the file.

It has been before stated, that if a defendant omits to put in his demurrer, or to answer within the time limited by the order, and an attachment is, in consequence, issued against him for want of an answer, a demurrer, even though coupled with an answer, will be irregular, and that in such case the proper course is, to move that the demurrer and answer be taken off the file, and not that the demurrer be overruled (*r*).

Difference between taking off the file and overruling.

It is right here to advert to the distinction in practice between taking a demurrer and answer off the file, and simply overruling the demurrer, thereby leaving the answer on the file. The former course appears to be the one adopted in all cases where there has been an irregularity in the filing of the demurrer, whether it be accompanied by an answer or not (*s*). The course of overruling the demurrer is adopted, wherever the demurrer has been properly filed, but the Court is of opinion that it is insufficient, or that it has been overruled by the answer; a demurrer will also be overruled where a defendant,

(*o*) 9 Ves. 179.

(*p*) Vide etiam Baker v. Mellish, 11 Ves. 73.

(*q*) Ante, vol. I, 658.

(*qq*) Poole v. Marsh, 7 Sim. 521.

(*r*) Ibid. Curzon v. De la Zouch, 1 Swanst. 193.

(*s*) Ibid.

Of filing.

after filing it, omits to conform to some of the rules of practice, with regard to setting it down, &c., which will be presently pointed out. This distinction affords a solution to the difficulty, which appears to have divided the Court of Exchequer in *Atkinson* v. *Hanway* (*t*), in which, as has been stated, the defendant had answered the original Bill, but afterwards, upon its being amended, had demurred to the whole record, and the Court were unanimous in the opinion, that the defendant should have demurred only to that part of the Bill which had been introduced by amendment, but were divided upon the question, whether the defendant should have moved to take the demurrer off the file, or should have set it down, and have had it overruled, which last course, there can, after the decision in *Curzon* v. *De la Zouch*, above referred to, be little doubt should have been the one resorted to; it being clear that the demurrer was properly filed in point of practice, though, being too extensive in covering that part of the Bill which had been previously answered, it was liable to be overruled.

After demurrer has been taken off the file, defendant may put in a fresh demurrer or plea.

It may be noticed, with reference to this part of the subject, that where a demurrur has been taken off the file for irregularity, it ceases to be a record of the Court, and the defendant may, therefore, put in a plea, or another demurrer, (if his time for demurring has not expired,) as if no demurrer had been filed (*u*).

In what manner taken off the file.

It is to be observed, however, that the demurrer is not taken off the file by the mere pronouncing of the order, but that it must actually be withdrawn from the file. To effect this, the order when drawn up should be carried to the Clerk in Court, who will withdraw the demurrer annexing the order to it (*x*).

Of entering a demurrer.

After the demurrer has been filed, it must be entered with the Registrar, which is done by the defendant's Clerk in Court leaving a note with the Registrar, and paying at the same time the usual fee (*y*). Formerly, a certificate from the Six Clerk, of the demurrer having been filed, was produced, but it has of late years been dispensed with (*z*).

(*t*) 1 Cox. 360.
(*u*) Cust v. Boode, 1 S. & S. 21.
(*x*) Ibid.
(*y*) Hind. 212.
(*z*) Ibid.

A demurrer must be entered within eight days after filing (*a*); otherwise it will be overruled, and so if the demurrer be accompanied by a plea, or answer, or both, the demurrer and plea must be entered, or they will be overruled of course (*b*). It is to be observed, that the eight days within which a demurrer must be entered with the Register, are eight days of the office being open; and, therefore, where a demurrer was filed on the 9th of April, and on the 12th of that month the Registrar's Office was closed for the Easter holidays, and was not re-opened until the 24th, and the demurrer was entered on the 26th, the Vice-Chancellor held that the demurrer was entered in due time (*c*).

Of entering.
Must be within eight days.

It is stated that a severe practiser, upon search at the Registrar's Office, finding no entry of the demurrer there, would be strictly regular in taking out a subpœna for 40s. costs (*d*). He might, also, under the old practice, have had a subpœna for a better answer, but under the new orders such a proceeding would be improper, as by those orders the time allowed to a defendant for putting in his answer will not have expired.

If not, defendant will be liable to costs.

After a demurrer has been entered with the Registrar, either party may have it set down for argument. This is done by leaving a petition with the Lord Chancellor's secretary for an order to set down the demurrer. No deposit is requisite. When the petition is answered, it must be left at the Registrar's office for the order to be drawn up and passed, and when it has been passed and entered, it must be served upon the opposite Clerk in Court, by leaving the copy and showing the original order to the Clerk in Court, or his agent, at his seat (*e*). The order directs the demurrer to be set down next after the pleas and demurrers already appointed, but that the same is to be set down in four days, or else the order is to be of no effect (*f*). The service of this order upon the Clerk in Court for the opposite party, must take place at least two days

In what manner set down for argument.

Order to set it down.

Service of.

(*a*) Hind. 212.
(*b*) Ib.; Beames' Orders, 77; Jordan v. Sawkins, 3 Bro. C. C. 372.
(*c*) Bullock v. Edington, 1 Sim. 481.
(*d*) Beames' Orders, 174; 1 T. & V. 813.
(*e*) Hind. 213.
(*f*) Hand. 18.

Of setting down. before the day appointed for hearing (*g*); and, as by a recent arrangement, demurrers are put into the paper two days after they are set down, the party serving the demurrer should be careful that the order is served, immediately after the setting down (*h*).

By the general order of the Court, no demurrer is to be set down for hearing on any particular day, except the order for setting down the same be brought to the Registrar to be entered at least two days before the day appointed for hearing such demurrer (*i*), and it is to be observed that in general the Court cannot direct a demurrer to be heard at an earlier day than the one appointed, although it may advance it to the head of the paper on that day (*k*).

In injunction cases.

In cases, however, of Bills for injunction, as no injunction can issue pending a demurrer (*l*), the Court will, upon application, where the matter is pressing, order the demurrer to be argued immediately; but it is not a matter of course to do so, and where there had been considerable delay in filing the Bill, which was unaccounted for, the Court refused to advance the demurrer (*m*).

In what cases plaintiff may amend after demurrer entered.

If the defendant put in a demurrer which it is apprehended will hold good, the best way for the plaintiff, if he intends to discontinue the suit, is to move and obtain an order to dismiss his Bill, with costs to be taxed by a Master, which costs being paid to the defendant, there is an end of the suit (*n*). But if the plaintiff thinks he has sufficient equity in his case, but that he has not stated it in the most favorable manner upon his Bill, he may apply to the Court, either by motion or petition, to amend his Bill, on payment of twenty shillings costs (*o*);

Set down.

this, however, must be done before the demurrer is set down to be argued, otherwise the plaintiff must pay the defendant the costs of the demurrer, and twenty shillings besides, before he can amend (*p*). These costs, as we have seen, have been usually

(*g*) ' Newl. 115.
(*h*) 1 Smith's Ch. P. 146.
(*i*) Beames' Orders 129.
(*k*) Anon. 1 Mad. 557.
(*l*) Cousins v. Smith, 13 Ves. 164.
(*m*) Jones v. Taylor, 2 Mad. 181.
(*n*) 1 Harr. 216.
(*o*) Ante, vol. 1, 521.
(*p*) 1 Har. 216.

Of setting down.

fixed at five pounds (*q*), and where, after a demurrer had been set down, the plaintiff submitted, and obtained the ordinary order to amend on payment of twenty shillings, the Court, upon motion by the defendant, ordered him to pay the additional five pounds (*r*).

Costs of demurrer, where plaintiff submitted and amended.

If a plaintiff wishes to amend his Bill after a demurrer has been set down, he must obtain leave to do so before it is called on for argument; otherwise he will not be permitted to do so In *Holmes* v. *Waring* (*s*), however, the Court of Exchequer, in a clear case of omission by oversight, made an order that the plaintiff might have liberty to amend, after the demurrer had been opened, but on making the order the Lord Chief Baron (Richards) required that it should be entered as part of the order that the permission had been given upon the Court being informed by Counsel that the omission in the Bill had been the consequence of a mere mistake. The plaintiff was of course ordered to pay the costs of the demurrer.

Amendment of Bill not permitted after demurrer called on.

Unless in a clear case of oversight.

In general a demurrer is set down for argument by the plaintiff, but if the plaintiff does not think proper to do so, the defendant may, and ought to set it down himself, otherwise he will not be in a situation to have the Bill dismissed for want of prosecution till the demurrer has been disposed of (*t*). In injunction cases, also, it may be necessary for the defendant to set the demurrer down for argument himself; for, by the 10th of Lord Brougham's Orders (*u*), if the demurrer is not filed before the expiration of eight days from appearance, the plaintiff may obtain a common injunction upon motion, as of course, and in that case, if a demurrer should be filed after the injunction has been issued, the defendant must himself take the necessary steps to get it allowed. In injunction cases, however, care should be taken to file the demurrer before the eight days have expired.

In what cases set down by defendant.

After a demurrer has been set down, the defendant may, by motion, obtain an order to withdraw it on payment of costs, to be taxed by a Master (*x*).

How withdrawn.

(*q*) Ante, ubi supra.

(*r*) Anon. 9 Ves. 221. These costs will now, under Ord. XXXII. (1828,) be taxed costs.

(*s*) 8 Price 604.

(*t*) Done v. Allen, 1 Dick. 55; Anon. 2 Ves. jun. 287.

(*u*) Orders, 1833, x.

(*x*) Downes v. E. I. Comp. 6 Ves. 586.

Of hearing.

Hearing of demurrer.

Where either party omits to appear.

When a demurrer is called on for hearing, if either party omits to appear, it will be struck out of the paper of demurrers, unless the other side produces an affidavit of service of the order to set it down either upon the party appearing, by the party setting it down, or, where it has been set down by the party appearing, upon the Clerk in Court of the other side. Where a demurrer has been struck out of the paper a fresh order must be obtained for setting it down, which may be had either upon petition or motion (*y*).

Where affidavit of service is produced.

If the party appearing is the plaintiff, the demurrer is not necessarily overruled; he must be heard in support of the Bill, the affidavit of service not authorizing the Court, in the absence of the defendant, to overrule the demurrer, but to hear the plaintiff (*z*). But where the defendant appears, and the plaintiff does not, the defendant, on producing an affidavit of service, may have the demurrer allowed with costs (*a*).

Manner of hearing.

The usual course of proceeding when the demurrer comes on for hearing, and all parties appear, is, generally, for the junior Counsel for the party setting the demurrer down for argument to open the pleadings, after which the Counsel in support of the demurrer are heard, and next the plaintiff's Counsel, and then the leading Counsel for the demurring party replies. In hearing a demurrer, the argument is strictly confined to the case appearing upon the record, and for the purposes of the argument, the matters of fact stated in the Bill are admitted to be true (*b*).

After demurrer called on, Bill cannot be amended;

unless in cases of oversight, &c.

After a demurrer has been called on for hearing, the Court will not in general allow the plaintiff, at his own suggestion, to amend his Bill, unless by consent of the defendant, though, as we have seen, such a proceeding was permitted by the Court of Exchequer in a cause where a mistake had been made in the Bill by mere inadvertence or oversight, upon payment of the costs (*c*).

(*y*) Tolson v. Lord Fitzwilliam 4 Mad. 403.

(*z*) Penfold v. Ramsbottom, 1 Swanst. 552.

(*a*) Jennings v. Pearce, 1 Ves. J. 447.

(*b*) Vide ante, p. 20.

(*c*) Holmes v. Waring, ubi supra.

Where it has appeared upon the hearing of a demurrer to the whole Bill that the defendant is entitled to demur to some part only, the Court has permitted the demurrer to be amended, so as to confine it to the parts to which the defendant has a right to demur (*c*); in such cases, however, the most usual course is to overrule the demurrer, and to give the defendant leave to put in a new demurrer to such part of the Bill as may be advised.

Demurrer *ore tenus.* Amendment of demurrer permitted at the hearing.

It has been before stated, that when a demurrer comes on for argument, the plaintiff may assign a new cause of demurrer, *ore tenus*, different from that stated on the record, and the rules which regulate this proceeding have been pointed out; the consequence of this mode of demurring, so far as regards the costs, will be discussed in a future section. It is, however, to be observed here, that a defendant cannot demur, *ore tenus*, unless there is a demurrer on the record; and that, upon this ground, where a defendant had pleaded, and, upon the plea being overruled, offered to demur *ore tenus*, for want of parties, he was not permitted to do so (*d*).

Demurrer *ore tenus*, confined to cases where there is a demurrer on record.

A defendant also cannot demur *ore tenus* for the same cause that has been expressed in the demurrer, on record, and overruled (*e*), nor can he after a demurrer to the whole Bill, demur *ore tenus* as to part (*f*).

But cannot be upon the same ground.

It seems, however, that after a demurrer to part of the Bill, has been overruled, the defendant may demur *ore tenus* to the same part (*g*).

Nor to part only of the Bill; unless the original demurrer was to the same part, *semble.*

Sect. V.

Of the Effect of allowing Demurrers.

Strictly speaking, upon a demurrer to the whole Bill being allowed, the Bill is out of Court, and no subsequent proceed-

Where demurrer is allowed to the whole Bill.

(*c*) Glegg v. Legh, 4 Mad. 193.

(*d*) Durdant v. Redman, 1 Vern. 78; Hook v. Dorman, 1 S. & S. 227.

(*e*) Bowman v. Lygon, 1 Anst. 1.

(*f*) Vide Shepherd v. Lloyd, 2 Y. & J. 490.

(*g*) Crouch v. Hicken, 1 Keen. 385; ante, 73.

To the whole Bill.

Whether amendment can be allowed.

ing can be taken in the cause (*a*). There are cases, however, in which the Court has afterwards permitted an amendment of the Bill to be made (*b*), and it seems that, even after a Bill has been dismissed by order, it has been considered in the discretion of the Court to set the case on foot again (*c*). The instances in which this has been done, however, are very rare: the only cases, indeed, that occur in the books, in which an amendment of the Bill has been permitted after a demurrer, are those of *Lord Coningsby* v. *Sir Joseph Jekyll*, and *Lloyd* v. *Loaring* above referred to. With respect to the first of these cases, being a decision of the Duchy Court only, it can scarcely be considered of sufficient authority to overrule the decisions of the Court of Chancery, which have been before noticed; and, with respect to the latter, it is to be observed, that the motion upon which it was founded was made in consequence of the intimation given by Lord Eldon, at the original argument of the demurrer, that he would, if asked, give the plaintiffs leave to amend; so that, in fact, the order can only be considered as part of the order made at the hearing of the demurrer. It may, therefore, be considered as a positive rule of the Court, liable to scarcely any exception, that, after a demurrer has been allowed, the case is entirely out of Court. The consequence of this is, that any order made subsequently in the cause will be irregular; and in *Watkins* v. *Bush*(*d*), Lord Kenyon, M. R., said that when, after a demurrer had been allowed, the plaintiff amended his Bill, the course the defendant should have taken, (if any were necessary,) should have been to apply to discharge the order to amend, for irregularity. It is to be noticed that, to the above case, Mr. Dickens has added a query :—' as the cause is out of Court, how could he apply ? ' and suggests whether it would not be more advisable for the defendant not to pay the least regard to any step the plaintiff might take, and leave it to the plaintiff to justify any unwarrantable measure he might adopt to compel the de-

Amendment of Bill after demurrer allowed irregular.

(*a*) Smith v. Barnes, 1 Dick. 67; Watkins v. Bush, 2 Dick. 701.

(*b*) Lord Coningsby v. Sir J. Jekyll, 2 P. Wms. 300; Lloyd v. Loaring, 6 Ves. 779.

(*c*) Per Lord Eldon, in Baker v. Mellish, 11 Ves. 68, 72.

(*d*) 2 Dick. 701.

fendant to pay obedience; and there can be no doubt that the defendant might, if he pleased, act in conformity with that suggestion. Still a party might be unwilling to expose himself to the consequences of resisting the process of the Court, which might issue upon the amended Bill, even though he were certain that he might ultimately set it aside, and compel the plaintiff to pay him his costs; and it would be very adverse to the principles upon which the Court usually acts, if they were to deny a defendant, so circumstanced, the opportunity of taking other measures to get rid of the irregular proceedings.

To the whole Bill.

It is to be observed that in *Watkins* v. *Bush* (*e*), the defendant did not apply by motion to discharge the order to amend, but he took the course of demurring to the amended Bill, by which the Master of the Rolls held he had waived the irregularity, and the demurrer was overruled.

But if defendant demurs to the amended Bill he waives the irregularity.

But although, after a demurrer has been allowed, the Bill is out of Court, and no order can be subsequently made in the cause, the Court will in some cases, where it sees that the defect pointed out by the demurrer can be remedied by amendment, and substantial justice requires it, make a special order, at the hearing of the demurrer, adapted to the circumstances of the case (*f*). Thus, where the demurrer is allowed on the ground of want of parties, the Court generally gives the plaintiff leave to amend his Bill, by adding parties as he may be advised (*g*).

In what cases a special order to amend will be made at the hearing.

An opinion appears to have been prevalent in the profession that, upon an objection to a Bill for want of parties being allowed, it is obligatory upon the Court to give permission to the plaintiff to amend his Bill. In a recent case, however, before Lord Cottenham, C., the rule has been materially qualified (*h*). The case came before his Lordship on appeal from a decision of the Master of the Rolls (Lord Langdale), who, upon allowing a demurrer for want of parties, refused to give the plaintiff leave to amend his Bill, by adding the necessary parties; his Lordship, on dismissing the appeal, said, that 'when it is said

Upon demurrers for want of parties, leave to amend usually given.

But such rule is not obligatory,

(*e*) 2 Dick, 701.
(*f*) Ante, vol. 1, 521.
(*g*) Ante, vol. 1, 383.
(*h*) Tyler v. Bell, 2 M. & C. 89.

To the whole Bill.

that a Bill is never dismissed for want of parties, nothing more is meant, than that a plaintiff, who would be entitled to relief if proper parties were before the Court, shall not have his Bill dismissed for want of them, but shall have an opportunity afforded of bringing them before the Court: but if, at the hearing, the Court sees that the plaintiff can have no relief under any circumstances, is it bound to let the cause stand over, in order that the plaintiff may add parties to so hopeless a record? There must be a discretion in the Court, and the cases of *Lowe* v. *Fairlie* (*i*) and *Lewis* v. *Gentle* (*k*) prove that such discretion exists. I think that the Master of the Rolls properly in this case refused permission to amend. I am of opinion that this Bill is clearly defective for want of parties; and that the case stated is such as to make it impossible to obtain any relief upon this Bill against the defendants to the Bill, and that the plaintiff ought, therefore, not to have leave to amend.'

and will be departed from where it is clear that plaintiff cannot obtain relief against the defendant demurring.

Leave to amend after demurrer in other cases besides want of parties.

It is to be observed that the practice of giving the plaintiff leave to amend his Bill, upon allowing a demurrer, is not confined to cases where there is a defect of parties. The Court has exercised its discretion in this respect in many other instances, and in a case in Irelend (*m*), Sir Anthony Hart gave the plaintiff permission to amend after a demurrer for multifariousness (which goes to the whole Bill,) had been allowed, upon a special case being made, showing that the multifarious part could be separated, and was not mixed up with the rest of the record.

Leave to amend generally sometimes given after demurrer.

It frequently happens that when a demurrer for want of parties is allowed; the Court, instead of confining its permission to amend to a mere addition of parties, will, upon the plaintiff's application, give the plaintiff general leave to make such amendments as he may be advised (*n*).

Amendment after demurrer does not preclude amendment after answer.

It has been before stated that the amendment of a Bill, in pursuance of an order made upon the hearing of a demurrer, will not preclude a plaintiff from making one amendmennt after answer under the 13th order upon motion of course (*o*).

(*i*) 2 Mad. 101.
(*k*) Cited 2 M. & Craig. 111.
(*m*) Johnstone v. Anthony, Mo.l. 373.
(*n*) Newton v. Lord Egmont, 4 Sim. 585; ante, vol. 1, p. 386.
(*o*) Ante vol. 1, p. 538.

Although the effect of allowing a demurrer to the whole Bill is to put the cause out of Court, the allowance of a partial demurrer is not attended with such a consequence. The Bill, or that part of it which was not covered by the demurrer, still remains in Court, and the plaintiff may obtain an order to amend or to refer the answer upon exceptions, or adopt any other proceedings in the cause, in the same manner that he might have done had there been no demurrer (*p*).

Where a partial demurrer allowed, Bill is not out of Court; and plaintiff may proceed in the Cause.

A demurrer being frequently on matter of form is not, in general, a bar to a new Bill; but if the Court, on demurrer, has clearly decided upon the merits of the question between the parties, the decision may be pleaded in another suit (*q*).

In what cases a demurrer is a bar to a new Bill.

By an order of the 21st July, 1810, the costs on allowing a demurrer to be paid by the plaintiff to the defendant, were fixed at 5*l*. (*r*), and the parties were liable, under another order of the 6th February, 1794, to such further costs as the Court thought fit to award (*s*), and there have been several instances in which the Court has given further costs under that order (*t*), though the practice of giving them was never adopted as a rule, in all cases, till the promulgation of Lord Lyndhurst's orders (*u*), by which it has been provided that, upon the allowance of any plea or *demurrer*, the plaintiff or plaintiffs shall pay to the defendants the taxed costs thereof, and when such demurrer is to the whole Bill then the further taxed costs of the suit also; unless the Court shall think fit to make other order to the contrary.

Costs under the old practice.

Under the new orders.

The consequence of this order is, that where a demurrer to the whole Bill is allowed, the plaintiff must pay the taxed costs of the demurrer and of the suit, unless the Court makes a special order to the contrary.

With respect to the costs of demurring *ore tenus*, the old rule of the Court was, that if any case of demurrer should arise more than was particularly alleged, yet the defendant

Where the cause has been alleged *ore tenus*.

(*p*) Lord Red. 175.
(*q*) Ibid.
(*r*) Beames' Ord. 320; Beames on Costs, 223.
(*s*) Beames' Ord. 456.
(*t*) Beames on Costs, 233.
(*u*) Ord. 1828, xxi.

Costs.

should pay the ordinary costs of overruling a demurrer, if those cases which were particularly alleged were disallowed, although the Bill, in respect of that particular so newly alleged, shall be dismissed by the Court (*x*).

In *Tourton* v. *Flower* (*y*), however, the demurrer appears to have been allowed *without costs*, "because the demurrer on record was an ill one, and the plaintiffs were not to blame to argue it;" but then it was said that neither ought the plaintiffs to have costs of a Bill appearing to be ill, and to want parties; and, in a note by the reporter, it is added that what is said in *Durdant* v. *Redman* (*z*), that costs ought to be paid for a new demurrer, insisted on at the Bar, *ore tenus*, is not now the practice; and in this last statement most of the books of practice agree (*a*). In a recent case, however (*b*), Lord Eldon stated the practice to be, that "if a defendant cannot sustain the demurrer on the record he is entitled to demur *ore tenus; but, availing himself of that right, he must pay the costs of the demurrer on the record;*" and this appears to be the present rule (*c*).

Where leave is given to amend by adding parties.

In general, however, where the demurrer, *ore tenus*, has been allowed on the ground of want of parties, and the Court has given the plaintiff leave to amend his Bill by adding parties, the practice has been not to compel him to pay the costs of the demurrer (*d*); and where in such cases the plaintiff, instead of taking leave to amend by adding parties, has asked for and obtained leave to amend his Bill generally, the course of the Court appears to be to make him liable to the costs of the demurrer (*e*). The rule, however, with respect to

Where leave is given to amend generally.

(*x*) Durdant v. Redman, 1 Vern. 78; Beames' Orders, 174.

(*y*) 3 P. Wms. 371; vide etiam Broderip v. Phillips, 1 Vern. 78 n.; Ed. Raithby. Wood v. Thompson, 2 Dick. 510.

(*z*) 1 Vern 78.

(*a*) Vide Prac. Reg. 163; Curs Canc. 206; 1 Prax. Alex. 16, 486; Beames' Orders 174, n. 39.

(*b*) Attorney-general v. Brown, 1 Swanst. 265, 288.

(*c*) Mortimer v. Fraser, 2 M. & Craig, 173.

(*d*) Ante, v. 1, 386.

(*e*) Ib. It is to be observed, that this practice is not inconsistent with the general rule above laid down, that a defendant demurring *ore tenus* must pay the costs on the record. If the plaintiff on such occasion, instead of submitting to have his Bill dismissed, as must be the case upon the allowance of the demurrer, unless it is accompanied with a permission to amend by adding parties, takes the benefit of such permission, it is but fair

costs upon such occasions, is not imperative, and the Court has a discretionary power; and, therefore, where the Vice-Chancellor, upon allowing a demurrer *ore tenus*, for want of parties, ordered the defendant to pay the costs of the demurrer on the record, although he had given the plaintiff leave to amend his Bill generally, Lord Cottenham refused to make any alteration in the order; his Lordship being of opinion, that as the 31st order was imperative, unless the Court thought fit to make an order to the contrary, and as the Vice-Chancellor had not thought fit to make use of the discretion given him by the order, he (the Lord Chancellor) could not interfere (*f*).

Costs.

Where a demurrer to a Bill is allowed, and afterwards the order allowing it is, upon re-argument, reversed, the defendant, if he has received the costs from the plaintiff, will be ordered to refund them, upon application by the plaintiff (*g*); and so if a demurrer has been overruled, and the order is reversed upon re-hearing, the plaintiff, if he has received costs from the defendant, must refund them.

Where costs of demurrer had been paid, ordered to be refunded upon reversing the order.

Sect. VI.

Of the Effect of overruling Demurrers.

A demurrer being a mute thing cannot, like a plea, be ordered to stand for an answer (*h*).

Demurrer cannot stand for an answer.

After a demurrer to the whole Bill has been overruled, a second demurrer to the same extent cannot be allowed, for it

After demurrer to the whole Bill overruled,

that he should lose his right to the costs of a proceeding by which in fact he is benefited, for there can be no doubt, that it is in general an advantage to a plaintiff to have a defect of that nature pointed out in an early stage of the cause, so that he may remedy it, before it comes on for hearing. And so if, after a demurrer for want of parties allowed, the plaintiff asks for and obtains leave to amend further than by adding parties, it is only right that he should pay the costs of a proc[illegible]ding which has [illegible] the effect of directing [illegible]s atte[illegible]n to the defects in his reco[illegible]d, and [illegible]s given h[illegible]m an opportun[illegible]ty of [illegible]edying them without his [illegible] the expenses of a separate application for that purpose.

(*f*) Mortimer v. Fraser, ubi sup.

(*g*) Oats v. Chapman, 1 Ves. 542, 2 Ves. 100. S. C.; 1 Dick. 118. S. C.

(*h*) Anon. 3 Atk. 530.

To the whole Bill. no second demurrer allowed, unless it be less extended.

would be in effect to rehear the case on the first demurrer; as, on argument of a demurrer, any cause of demurrer, though not shewn in the demurrer as filed, may be alleged at the bar, and if good will support the demurrer (*a*). A demurrer, however, of a less extensive nature, may, in some cases, be put in; and in *Devonsher* v. *Newenham* (*b*), which has already been repeatedly referred to, where the substance of a demurrer was good, but was informally pleaded, so that the demurrer was overruled, Lord Redesdale gave the defendant liberty to take it off the file, and to demur again, as he should be advised, on payment of costs. In *Glegg* v. *Legh* (*c*), where a demurrer was put in to the whole Bill, the Court allowed the defendant to amend it so as to make it less extensive.

A demurrer on record reduced in its limits by amendment.

And in *Thorpe* v. *Macauloy* (*d*), where a Bill was filed for a discovery and for a commission to examine witnesses abroad, to which a demurrer was put in, the Court being of opinion, that the plaintiff was entitled to the commission, although, under the circumstances, the defendant could not be compelled to make the discovery required, permitted the defendant to amend his demurrer, and to limit it only to the discovery.

But no second demurrur without leave of the Court.

A second demurrer, however, though less extended than the first, cannot, after the first demurrer has been overruled, be put in without leave of the Court; but the case is different where the first has been taken off the file for irregularity (*e*). This leave is generally granted, upon hearing the first demurrer, but it has been permitted upon a subsequent application by motion.

After demurrer overruled defendant may plead,

But although a defendant cannot, after the Court has overruled his demurrer to the whole Bill, again avail himself of the same method of defence, yet, as it sometimes happens, that a Bill which, if all the parts of the case were disclosed, would be open to a demurrer, is so artfully drawn as to avoid shewing upon the face of it any ground for demurring, the defendant may in such case make the same defence by plea, stating the

(*a*) Lord Red. 176.
(*b*) 2 Sch. & Lef. 199.
(*c*) 4 Mad. 207.
(*d*) 5 Mad. 218.
(*e*) Ante, p. 81.

facts which are necessary to bring the case truly before the Court (*f*). As it is, however, the rule of the Court, not to allow two dilatories without leave, or, in other words, as the defendant is only permitted to delay his answer by plea or demurrer, without leave of the Court, once, he must, previously to filing his plea, obtain the leave of the Court to do so, otherwise his plea may be taken off the file (*g*).

To the whole Bill, but not without leave of the Court.

From what has been said, it results, that, after a demurrer to the whole Bill has been overruled, the defendant, unless he obtains leave to put in a demurrer of a less extended nature, or a plea either to the whole Bill or to some part of it, must put in a full answer. If he does not do so within the ordinary time allowed by the Court, after appearance, for putting in an answer, the ordinary process of contempt issues to compel an answer, as in other cases. He may, however, if the time for answering be expired before his demurrer has been decided upon, obtain an order for further time to put in his answer. And it seems that the defendant, at the time of the demurrer being overruled, is entitled to apply to the Court for time to answer, and that the Conrt will, in order to protect him against an attachment, to which he might be liable, if he were to wait till he could obtain an order for time in the usual course, grant such time as it shall think proper (*h*). If a defendant omits to ask for time, and the demurrer is overruled, he may do so afterwards, but it must be by special application (*i*); he must, therefore, make his application to a Master, as directed by the 3 & 4 W. 4, c. 94, s. 13, and not to the Court.

If after demurrer overruled, defendant does not obtain leave to demur again or to plead, he must put in a full answer.

Time for answering how obtained.

Where a demurrer is not to the whole Bill, but is accompanied by an answer, the plaintiff, after the demurrer is overruled, if he wishes for a further answer, must except to the answer for insufficiency; and, therefore, the defendant need not put in any answer till after the plaintiff has taken exceptions to the answer already put in, and such exceptions have either been allowed or submitted to (*k*). We have seen before, that the

Where demurrer accompanied by answer, is overruled, defendant need not answer till the plaintiff has excepted.

(*f*) Ld. Red 176.
(*g*) Rowley v. Eccles, 1 S. & S. 512.
(*h*) Trim v. Baker, 1 T. & R. 253.
(*i*) Ib.
(*k*) Cotes v. Turner, Bunb. 123.

Costs.

plaintiff ought not to except to the answer till the demurrer has been decided upon (*l*).

Injunction granted of course.

In an injunction suit, a common injunction will be granted of course upon a demurrer to the Bill being overruled (*m*); but it can only issue upon motion; and it was formerly held, that such motion must be made according to the usual course of the Court, that is, on any day in term time, or on a seal day out of term; so that, where a demurrer was overruled upon hearing out of term, the plaintiff had to wait until the next seal, before he could obtain his injunction (*n*). The practice, however, now is, that the common injunction may be moved for on any day of the Court's sitting, whether in term or out of term

Costs.

By the 32nd of Lord Lyndhurst's Orders, it is ordered, that upon the overruling of any plea or demurrer, the defendant or defendants shall pay to the plaintiff or plaintiffs the *taxed costs* occasioned thereby, unless the Court shall make other order to the contrary (*o*).

(*l*) Ante, p. 77.

(*m*) Kashleigh v. Buller, 1 Dick. 153. and Mad. & Geld, 299, p. a.

(*n*) Claughton v. Hadwell, Mad. & Geld. 299.

(*o*) Orders, 1828, xxxii.

CHAP. XIII.

Of Pleas.

Sect. I.—*Of the general Nature of Pleas.*

Nature of Pleas.

A Demurrer has been mentioned to be the proper mode of defence to a Bill, when any objection is apparent upon the Bill itself, either from matter contained in it, or from defect in its frame, or in the case made by it. When an objection to the Bill is not apparent on the Bill itself, if the defendant means to take advantage of it, he must shew to the Court the matter which creates the objection, either by answer or by plea, which has been described as 'a special answer, shewing or relying upon one or more things as a cause why the suit should be either dismissed, delayed, or barred (*a*).'

The defence proper for a plea is, such as reduces the cause, or some part of it, to a single point, and from thence creates a bar to the suit, or to the part of it to which the bill applies (*b*). It is not, however, necessary that it should consist of a single fact, for though a defence offered by way of plea, consists of a great variety of circumstances, yet, if they all tend to one point, they will be good (*c*).

In general, a plea relies upon matters not apparent upon the Bill; and in most cases it is a rule, that where a defendant insists upon matter by plea which is apparent upon the face of the Bill, and might be taken advantage of by demurrer, the plea will not hold (*d*). This rule, however, as will be seen presently, is in some cases liable to exception.

Affirmative pleas.

Where a plea merely states matter not apparent upon the

(*a*) Lord Red. 177; Prac. Reg. 273.

(*b*) Lord Red. 178.

(*c*) Ib. 296.

(*d*) Billing v. Flight, 1 Mad. 230.

Affirmative Pleas.

Bill, and relies upon the effect of such matter as a bar to the plaintiff's claim, it is called *an affirmative plea.* Such pleas usually proceed upon the ground that, admitting the case stated by the Bill to be true, the matter suggested by the plea affords a sufficient reason why the plaintiff should not have the relief he prays, or the discovery which he seeks; and, when they are put in, the Court, in order to save expense to the parties, or to protect the defendant from a discovery which he ought not to make, instantly decides upon the validity of the defence, taking the plea and the Bill, so far as it is not contradicted by the plea, to be true (*e*).

Negative Pleas.

But although pleas, generally, consist of the averment of some new fact or claim of facts, not apparent upon the face of the Bill, the effect of which is not to deny the facts of the Bill, but admitting them *pro hac vice* to be true, to destroy their effect, there are cases in which the plea, instead of introducing new facts, merely relies upon a denial of the truth of some matter stated in the Bill, upon which the plaintiff's right depends. A plea of this sort is called a *negative plea.* It seems, formerly, to have been made a question, how far a negative plea could be good (*f*); and where a Bill was filed by an individual claiming as heir to a person deceased, and the defendant pleaded that another person was heir, and that the plaintiff was not heir to the deceased, Lord Thurlow overruled the plea, on the ground, that it was a negative plea (*g*); but this decision was afterwards doubted, by the learned judge himself (*h*), when pressed by the necessary consequence, that any person falsely alleging a title in himself, might compel any other person to make a discovery, which that title, if true, would enable him to require, however injurious to the person thus improperly brought into Court; so that any person might, by alleging a title, however false, sustain a Bill in Equity against any person for any thing, so far as to compel an answer (*i*). Since that

(*e*) Lord Red. 295.

(*f*) Ibid 187.

(*g*) Newman v. Wallis, 2 Bro. C. C. 142; Gunn v. Prior, 2 Dick. 657; 1 Cox. 197. S. C.; Forrest Ex. Rep. 88. n.

(*h*) Hall v. Noyes, 3 Bro. C. C. 488.

(*i*) Lord Red. 187; Jones v. Davis, 16 Ves. 264, 265.

Negative Pleas.

time, frequent instances have occurred in which negative pleas have been allowed. Thus where to a bill praying that the defendant might redeem a mortgage or be foreclosed, the defendant pleaded that there was no mortgage, Lord Eldon allowed the plea (*k*); and so where a bill prayed that the defendant might be restrained from setting up outstanding terms of years in defence to an action of ejectment, and the defendant pleaded that there were no outstanding terms, the plea was held good (*l*); and where a Bill prayed an account of partnership transactions, a negative plea that there was no partnership was allowed (*m*).

Pleas of matters impeached by the Bill.

It is proper here to mention another species of plea which often occurs in the books, and is not, strictly speaking, either a plea affirming new matter, or negativing the plaintiff's title as alleged in the Bill, but one which re-asserts some fact stated in the Bill, and which the Bill seeks to impeach, and denies all the circumstances which the plaintiff relies upon as the ground upon which he seeks to impeach the fact so set up. Thus, where a Bill is brought to impeach a decree, on the ground of fraud used in obtaining it, the decree may be pleaded in bar of the suit, with averments negativing the charges of fraud (*n*); of the same nature are pleas setting up the award itself, to a bill filed for the purpose of impeaching it on the ground of partiality or fraud in the arbitrators; or a stated account, where error or fraud in the account is charged by the Bill for the purpose of avoiding its effect. Pleas of this nature have been objected to, because they are in fact *exceptiones ejusdem rei cujus petitur dissolutio* (*o*); but the frame of a Bill in Equity, in such cases, necessarily produces this mode of pleading, for, in the instance above alluded to, of a plea setting up the decree to a Bill seeking to impeach it, it is obvious, that if the Bill had stated the title under which the

(*k*) Hitchens v. Lander, Coop. R. 34.

(*l*) Armitage v. Wadsworth, 1 Mad. 189.

(*m*) Drew v. Drew, 2 V. & B. 159; vide etiam, Sanders v. King, Mad. and Geld. 61; Yorke v. Fry, ib. 65; Thring v. Edgar, 2 S. & S. 274, 281; Arnold v. Heaford, 1 M'Lel. and Y. 330.

(*n*) Lord. Red. 195.

(*o*) Pusey v. Desbouverie, 3 P. Wms. 317.

Pleas of matters impeached by the Bill.

plaintiff claimed, without stating the decree under which the defendant claimed, the defendant might have pleaded the decree alone in bar. If the Bill had stated the plaintiff's title, and also stated the decree, and alleged no fact to impeach it, and had yet sought relief on the title concluded by it, the defendant might have demurred; because, upon the face of the Bill, the title of the plaintiff would have appeared to be so concluded. But as by the forms of pleading in Equity, the Bill may set out the title of the plaintiff, and, at the same time, state the decree by which, if not impeached, that title would be concluded, and then avoid the operation of the decree, by alleging that it has been obtained by fraud; if the defendant could not take the judgment of the Court, upon the conclusiveness of the decree, by plea, upon which the matter by which that decree was impeached, would alone be in issue, he must enter into the same defence (by evidence as well as by answer,) as if no decree had been made, and would be involved in all the expense and vexation of a second litigation on the subject of a former suit, which the decree, if unimpeached, had concluded: it is, therefore, permitted to him, to avoid entering into the general question of the plaintiff's title as if it had not been affected by the decree, by meeting the case made by the plaintiff, which can alone give him a right to call for that defence; namely, the fact of fraud in obtaining the decree, which he does by negative averments in his plea (*p*). The same observations will apply to pleas of releases(*q*) or stated accounts, where Bills have been filed for the purpose of setting them aside. Some doubt, however, appears to have been thrown upon the right of a defendant, to avail himself of this mode of defence, by the Court of Exchequer in *Pope* v. *Bish* (*r*), and *Edmundson* v. *Hartley* (*s*), where the Bills were filed for the purpose of setting aside *awards*, charging that they had been obtained corruptly, and pleas were put in setting up the award and negativing the charges of corruption, and the Court, in both cases, held the pleas to be bad, as not bringing the case to one point; but in *Bayley* v. *Adams* (*t*), Lord Eldon

(*p*) Lord Red. 198.
(*q*) Lloyd v. Smith, 1 Anst. 258· Freeland v. Johnson, ib. 276.
(*r*) 1 Anst. 59.
(*s*) Ib. 97.
(*t*) 6 Ves. 586.

expressed his disapprobation of the decision of the Court of Exchequer in those cases, saying, that there was hardly one point of equitable proceedings with regard to pleas, which it was not extremely difficult to reconcile to them; and, although his Lordship did not decide the case upon the point now under consideration, there can be no doubt, from the tenor of his judgment, that his decision would have been in favour of carrying the principle supplied by cases upon pleas of other matters, to pleas of awards also (*u*). It should also be stated that, in a previous case, the Court of Exchequer had unanimously expressed an opinion, that where the Bill stated an award to have been obtained by misrepresentation of facts not known to the plaintiff, a plea of the award alone, without any averment to negative the charge of misrepresentation, was bad (*x*).

Pleas of matters impeached by the Bill.

It has been before stated, that bankruptcy and other matters arising between the Bill and the plea may be pleaded (*y*). This has been the case with regard to the bankruptcy of a plaintiff occuring after the Bill filed (*z*); and so where a Bill was filed for a discovery and relief by injunction to restrain the defendant from setting up outstanding terms to defeat a writ of right, a plea that since the filing of the Bill, the writ of right had been tried and determined against the plaintiff, was allowed to be a good plea (*a*). This rule has been adopted from analogy to proceedings at common law, where any matter which arises between the Bill and the plea, may be pleaded in bar (*b*); but the analogy, in this respect, between Courts of Law and Equity, will not extend further; for at law, even after plea, if any matter occurs which would abate the suit or operate as a bar,

Pleas of matters subsequent to the Bill.

Puis darrien continuance.

(*u*) Bayley v. Adams, 6 Ves. 597.

(*x*) It has been suggested by Mr. Wigram, in his 'Points on the Law of Discovery,' (page, 37, notis,) that now that negative pleas are fully established; perhaps the *anomalous* form of pleading, now under discussion, would not be held necessary in cases of this class; and, certainly, it is difficult to say, why a plea in such cases as those, to which this manner of pleading usually applies, should assume this form; and why a negative plea, meeting the matters suggested in the Bill, to avoid the effect of the bar set up, should not alone be sufficient?

(*y*) Ante, vol. 1, p. 77.

(*z*) Turner v. Robinson, 1 S. & S. 3.

(*a*) Earl of Leicester v. Perry, 1 Bro. C. C. 305.

(*b*) Turner v. Robinson, ubi supra.

Puis darrien continuance.

such matter might, previously to the recent new rules of pleading, adopted under the Uniformity of Process Act, be offered to the Court by a plea, termed a plea *puis darrien continuance*, and may still be pleaded with an allegation, that the matter arose after the last pleading, &c (*d*). In Courts of Equity, however, such a plea does not seem admissible, but the effect of it may be obtained by means of a cross Bill (*e*).

Effect obtained by cross Bill.

Of Double Pleading.

It is essential to observe that, whatever the nature of the plea may be, whether affirmative, or negative, or of the anomalous nature above alluded to, the matter pleaded must reduce the issue between the plaintiff and defendant to a single point. If a plea is double, *i. e.* tenders more than one defence as the result of the facts stated, it will be bad (*f*). Thus, where a plea stated, that the plaintiffs who claimed as citizens of London, never were resident there, or paying scot and lot, and that they were admitted freemen by fraud, for the purpose of enjoying the exemption claimed, was held bad; because the fact that the plaintiffs were not citizens of London, and that they were admitted by fraud, were totally inconsistent with each other (*g*). And so where a defendant to a Bill for the specific performance of an agreement, put in a plea, insisting upon the Statute of Frauds, and another defence, Lord Loughborough would not allow it, as it was a double defence, and directed it to stand for an answer (*h*). Upon the same principle, where a bill was filed praying a re-conveyance of four estates, and the defendant put in a plea whereby he insisted upon a fine as to one, and averred that the estate comprised in that fine, was the only part of the premises in the Bill in which he claimed an interest; the Vice-Chancellor, Sir A. Hart, held it to be bad as a double plea (*i*). The rule that a plea must reduce

(*d*) 1 Chitty on Pl. 658, 659.

(*e*) Lord Red. 64; vide Rowe v. Wood, 1 J. & W. 315; Wood v. Rowe, 2 Bligh, 595; Hayne v. Hayne, 3 Cha. Rep. 19; Nels. 105. S. C.

(*f*) Nobkissen v. Hastings, 2 Ves. J. 84; Jones v. Frost, 3 Mad. 1, 8.

(*g*) Corporation of London v. Corporation of Liverpool, 3 Anst. 738.

(*h*) Cooth v. Jackson, 6 Ves. 12; Whitbread v. Brockhurst, 1 Bro. C. C. 404.

(*i*) Watkins v. Stone, 2 Sim. 49.

the defence to a single ground, must be understood as not interfering with the proposition before laid down, that a plea may consist of a variety of facts and circumstances (*k*); all that it requires is, that those facts and circumstances should give as their result, one clear ground upon which the whole equity of the Bill may be disposed of (*l*). The rule upon this subject, and the reasons upon which it has been established, are stated with great clearness by Lord Thurlow, in his judgment in *Whitbread* v. *Brockhurst* (*m*) before referred to. His Lordship said, 'I cannot agree with the defendant's counsel, that any two facts which are not inconsistent, may be pleaded in one plea. I think that various facts can never be pleaded in one plea, unless they are all conducive to a single point, on which the defendant rests his defence. Thus, many deeds may be stated in a plea, if they all tend to establish the single point of title; so in the case of papacy (*n*). In the present case, the different matters pleaded do not conduce to one object. The plea of the Statute is of itself a bar; but the plea, that the agreement was not performed, is quite distinct; because, whether a part performance take the agreement out of the Statute, or be merely considered as a fraud, the point of equity is quite distinct from the agreement. It is a plea of two matters, perfectly clear and distinct, of two things which furnish two different pleas to the points made in the Bill. The reason why a defendant is not permitted to introduce several matters into one plea is, that it tends to the forwarding of justice, and saves great expense that the matter should be taken up shortly upon a single point; but that end is so far from being attained, if the plea puts as much in issue as the answer could do, that on the contrary it increases the delay and expense. But why, it may be asked, should not the defendant be permitted to bring two points, on which the cause depends, to issue by his plea? The answer is, because, if two, he may as well bring three points to issue; and so on till all

Of Double Pleading.

But that point may consist of various circumstances.

Rule in Equity, that inconsistent facts cannot be joined in one plea.

(*k*) Ritchie v. Aylwin, 15 Ves. 79, 82.

(*l*) Rowe v. Teed, 15 Ves. 379.

(*m*) Ubi supra; vide etiam, Wood v. Strickland, 2 V. & B. 150.

(*n*) Harrison v. Southcote, 1 Atk. 528.

Of Double Pleading.

the matters in the Bill are brought into issue upon the plea, which would be productive of all the delay and inconvenience which pleading was intended to remedy." (*o*)

Double plea in what cases allowed.

But, although the general rule of the Court is, not to allow of double pleading, there are cases in which the rule will be relaxed—as where great inconvenience would be sustained by the necessity of setting out long accounts, which could be obviated, if the defendant were to be allowed to plead several matters—cases of this nature may occur where a Bill is so framed that, if the principle case made by it cannot be supported, it may be sustained by some subsidiary matter, which has been introduced for the purpose of maintaining the suit. Tnus, in *Gibson* v. *Whitehead* (*p*), where a bill was filed, by simple contract creditors, to charge the real estates of a deceased debtor, alleging, first, that the testator, by his will, subjected his real estates to the payment of the debts; and, secondly, that if that was not the true construction of his will, then his real estates were liable under the 47 Geo. 3, sess. 2, c. 74, he having been a trader at the time of his death, Sir. J. Leach, V. C., made an order, upon motion, that the defendant might be at liberty to plead, first, the will of the testator, for the purpose of shewing that he did not thereby charge his real estates with the payment of his debts; and, secondly, that he was not, at the time of his death, a trader within the meaning of the act (*q*). But, although, in the above case, the necessity for a double plea arose from the circumstance of there being a sort of double or alternative claim in the Bill, this is not the only ground upon which the Court acts in allowing double pleas: the principle upon which the Court proceeds, depends very much upon the extraordinary inconvenience that might arise, if the defendant were not allowed to take this course; and upon this principle, where a Bill was filed to restrain the infringement of a patent, and for an account, and the defendants were desirous of disputing the validity of the patent, on the grounds that, so far as the invention was new, it was useless; and that so far as it

(*o*) Vide Sir S. Romilly's note of this judgment, 1 Bro. C. C. 415; Belt's Ed. cited 2 V. & B. 455.

(*p*) 4 Mad. 241.

(*q*) Vide etiam Hardman v. Ellames, 5 Sim. 640; 2 M. & K. 732. S. C.

was useful, it was not new; Lord Langdale, M. R., gave the defendant leave to plead, first, that the invention was not useful; secondly, that it was not new (*q*).

Double plea.

It is to be observed that, before a defendant puts in a double plea, he must obtain an order for leave to do so, by special motion upon notice; and that such a plea, filed without such an order, would be irregular as well as liable to be overruled (*r*).

Must have an order to warrant it.

With reference to the subject of multifarous or double pleading, it is to be noticed that, where the facts stated in the plea are sufficient to constitute a good plea, the introduction into the plea of a fact which, although it puts in issue a distinct matter, is not important to the validity of the plea itself, will not vitiate the plea. Thus, if a defendant pleads a release, and then avers that it has been acted upon, the release being of itself a bar whether it has been acted upon or not, the further allegation that it has been acted upon is unimportant, and will be rejected as surplusage (*s*); upon this ground, where a plea stated facts which, connected with the statement in the Bill, would have amounted to a conspiracy to prevent a prosecution for felony, and then averred that the transactions stated in the Bill, related to a fraudulent embezzlement by a banker's clerk, and suggested that the discovery sought might subject the defendant to pains and penalties, it was objected, that the plea was multifarious, because in addition to the statement of facts amounting to a conspiracy, it averred that the transactions related to a fraudulent embezzlement; Lord Eldon, however, overruled the objection, saying, that he should press a harder rule in equity than prevails at law by holding, that such an averment made a plea bad, which in other respects was good (*t*).

Introduction of an unimportant fact will not vitiate a plea.

The rule that a defendant cannot plead several matters, must not be understood as precluding a defendant from putting in several pleas to different parts of the same Bill; it merely prohibits his pleading, without previous leave, a double defence

Defendant may put in separate pleas to different parts of the same Bill.

(*q*) Kay v. Marshall, 1 Keen, 192.

(*r*) Ibid. Gibson v. Whitehead, ubi supra; Hardman v. Ellames, ubi supra.

(*s*) Claridge v. Hoare, 14 Ves. 59, 65.

(*t*) Ibid.

Surplusage.

to the whole Bill, or to the same portion of it. A defendant may plead different matters to separate parts of the same Bill, in the same manner that (as we have seen,) a defendant may put in different demurrers to different portions of the Bill. A defendant may, in like manner, plead and demur, or plead and answer, to different parts of the same Bill, provided he points out, distinctly, the different portions of the Bill which are intended to be covered by the plea, the demurrer, and the answer; he must, likewise, where he puts in several pleas to the same Bill, point out to what particular part of the Bill each plea is applicable. But, although the general rule is, that in the case of a partial plea, a defendant must specify distinctly what part of the Bill he pleads to, the rule which has been stated, as applicable to a demurrer, viz.—that it cannot be good in part and bad in part, is not applicable with the same strictness to a plea, for it has been repeatedly decided that a plea in equity may be bad in part and not in the whole, and the Court will allow it to so much of the Bill as it is properly applicable to (*a*). Thus, where a defendant to a Bill for the re-conveyance of an estate and for an account, pleaded—'as to so much of the Bill as sought to compel him to set forth whether the persons from whom he claimed, did not at or at any time before the conveyance of the estate to him, profess the popish religion, *or which sought to compel him to reconvey all or any part of such estate to the complainants, or which sought to compel the defendant to set forth any of his title-deeds or writings relating to the said estates, or any part thereof*';— the statute 11 & 12 Wm. 3, c. 1, whereby persons professing the popish religion were disabled, or made incapable of inheriting or taking by descent, &c. any lands, tenements, &c.; the Court allowed the plea as to the discovery sought by the Bill, whether the persons from whom the plaintiffs claimed, were not papists, but overruled it as to all the

Plea may be good as to part, and bad as to other part.

(*a*) Lord Red. 233; Coop. Eq. Pl. 230; Beames on Pleas, 45; Earl of Suffolk v. Green, 1 Atk. 450; Duncalf v. Blake, ib. 52; Huggins v. York Buildings Company, 2 Atk. 44; Dormer v. Fortescue, ib. 281; Turner v. Mitchel, 1 Dick. 249; Roche v. Morgell, 2 Sch. & Lef. 725; vide etiam, Harrison v. Southcote and Earl of Derby v. Duke of Athol, *ubi infra.*

other parts (*b*). And so in the case of the *Earl of Derby* v. *The Duke of Athol* (*c*), where the Bill was filed to obtain a discovery from the Duke, as to his general title to the Isle of Man; and also, to have relief on a particular point of equity, relating to the rectories and tithes within that island; and the Duke put in a plea to the jurisdiction of the Court, because the Isle of Man was an ancient kingdom, and not part of the realm, and that no lands, &c. there, ought to be tried or examined into here; Lord Hardwicke was at first inclined to allow the plea, as to that part of the Bill which related to the title to the Isle of Man, and to overrule it as to the rest of the relief; but owing to an informality in the plea, in not shewing in what Court the jurisdiction was, his Lordship felt himself obliged to overrule the plea *in toto* (*d*).

May be allowed in part only.

It follows from the above cases, that the rule that a plea may be allowed in part only, is to be understood with reference to its *extent*, *i. e.* to the quantity of the Bill covered by it, and not to the ground of defence offered by it, and that if any part *of the defence* made by the plea is bad, the whole must be overruled (*e*). Thus, if a defendant pleads a fine and non-claim, which is a legal bar, and a purchase for a valuable consideration without notice of the plaintiff's claim, which is an equitable bar: if either should appear not to be a bar, as if the defendant by answer should admit facts amounting to notice; or if the plea, with respect to either part, should be informal, the whole must be overruled; there seems to be no case in which the Court has separated the two matters pleaded, and allowed one as a bar and disallowed the other (*f*).

Rule refers only to the extent of the plea.

But, although it is the office of a plea to reduce the defence to a single point, it is necessary, in order to its validity, that all matters which are essential to bring it to that point, should be stated on the face of the plea, so that the Court may at once decide, whether the case which the plea presents to the Court is a bar to the case made by the Bill, or to that part of it which the plea seeks to cover.

Of averments in pleas.

(*b*) Harrison v. Southcote, 1 Atk. 528; 2 Ves. 389, S. C.

(*c*) 1 Ves. 203.

(*d*) Vide, 2 Ves. 354, 7. S. C.

(*e*) Vide acc. Lord Red. 240.

(*f*) Lord Red. 238.

Use of averments in corroboration of the plea.

Thus, if a Bill is brought to recover the possession of an estate, a defendant may protect himself by a plea, stating that he was the purchaser of the estate. and that he paid a valuable consideration for it, and that he had not, at the time of the purchase, any notice of the title or claim of the plaintiff to the property: this is called 'a plea of purchase for valuable consideration without notice,' and is, if true, a good bar to the suit. It will not, however, be sufficient, merely to state by way of plea, that the defendant is a purchaser for a valuable consideration without notice; but he must state upon the plea, that the person from whom he purchased, had such an interest in the property as entitled him to convey it to the defendant; that it was conveyed to the defendant by the proper mode of conveyance; that a valuable consideration was paid for it by the defendant; and, that the defendant had no notice of the claim of the plaintiff: for the coincidence of all these facts is necessary, to constitute a good bar in equity to a suit of the nature alluded to (*f*); and the omission of any of them would render the defence invalid, because the plaintiff has a right, by replying to the plea, to put all the matters contained in it in issue, and by that means to compel the defendant to support them, or at least such of them as are affirmatively stated by evidence. The statements of these necessary facts, in a plea, are called '*averments*,' and the necessity for their introduction, points out the general distinction between demurrers and pleas; for, if the fact necessary to constitute a good plea, appears sufficiently upon the Bill, so as to exclude the necessity of averments, the Bill might, in most cases, be objected to by demurrer (*g*).

In negativing allegations in the Bill, calculated to overrule the plea.

Another office of averments in a plea is, to exclude intendments, which would otherwise be made against the pleader; for, if there is any charge in the Bill, which is an equitable circumstance in favour of the plaintiff's case against the matter pleaded, such as fraud or notice of title, the Court will intend

(*f*) Lord Red. 222.

(*g*) Bicknell v. Gough 3 Atk. 558; Roberts v. Hartley, 1 Bro. C. C. 56; Billing v. Flight, 1 Mad. 230; Stiff v. Andrews, 2 Mad. 6.

Averments.

the matters so charged against the pleader, unless they are met by averments in the plea (*h*). Thus, where a Bill was filed by a remainder-man against a tenant for life, for an account of timber cut upon the estate, embracing a period of many more than six years previous to the filing of the Bill, which was in 1824, and alleging that, in answer to certain inquiries which the plaintiff had made as to the timber, the defendant had furnished certain accounts, from which it appeared that, since the year 1794 down to the year 1821, certain quantities of timber had been cut in each year, amounting to sums mentioned in the Bill, and the defendant pleaded the Statute of Limitations in bar, confining his averments only to the date of the filing of the Bill, the Court overruled the plea; because it held, that the alleged render of the accounts in the Bill, bringing the accounts down to the period within six years before the filing of the Bill, (which was not negatived by any averment in the plea,) defeated the operation of the Statute (*i*).

To have constituted a good plea in that case, there should have been an averment, that no such accounts as those alleged in the Bill, had been rendered. The necessity for the introduction of such averments into a plea is obvious, when we consider that a plea for the purpose of deciding on the validity of it, like a demurrer, admits all the facts stated in the Bill to be true, so far as they are not controverted by the plea (*k*); so that whenever matters of fact are introduced to the Bill, which, if true, would destroy the effect of the matter pleaded, the plea will be overruled, unless such matters are controverted by the averments.

The necessity for the introduction of this species of averment may be still further illustrated, if we attend to the nature of pleadings in Courts of Equity, especially since the disuse of special replications, rejoinders, surrejoinders, &c. When those pleadings were allowed, the plaintiff might have stated his case without suggesting, that it had been affected by any circumstances which might afford matter for a plea; such, for instance,

(*h*) Lord Red. 241.

(*i*) Hony v. Hony, 1 S. & S. 568.

(*k*) Plunket v. Penson, 2 Atk. 51; Roche v. Morgell, 2 Sch. and Lef. 727.

Averments.

as a release, or a decree binding the right. If, then, the defendant had pleaded the release or decree, the plaintiff might have replied, that the release or decree had been obtained by fraud, by which the plaintiff would have admitted that the plea was a bar, if not capable of impeachment on the ground of fraud; the defendant, by rejoinder, would then have avoided the charge of fraud, and sustained the release or decree; and then the issue would have been simply on the fact of fraud (*l*).

Affirmative averments.

From what has been said above, it will be seen that averments in pleas may naturally be divided into affirmative and negative averments. *Affirmative* averments are those which are not suggested by any matter upon the face of the Bill which is inconsistent with the matter pleaded, but are necessary in order to render the matter pleaded a complete bar. Thus, if a stated account is set up by the plea, the defendant must aver that the account is just and true, to the best of his knowledge and belief; and so, in the instance above referred to, of a plea of purchase for valuable consideration without notice, it has been stated that the defendant must aver, in his plea, that the person from whom he purchased had such an interest as entitled him to convey the estate to the defendant, and that it was conveyed to the defendant in a proper manner, and that a valuable consideration was paid for it, and that the defendant had no notice of the plaintiff's title; the concurrence of all these matters being requisite to constitute a good equitable bar to the plaintiff's claim. It may be objected that the last matter averred, namely, the want of notice, being negative matter, cannot properly be called an affirmative averment; but it is not the mere fact of averring affirmatively or negatively which constitutes the distinction to which I have referred, but whether the matter be introduced by way of affirmation of the defendant's plea, or of negation of such of the plaintiff's statements as are inconsistent with the plea. Thus the very fact of want of notice, in a plea of purchase for a valuable consideration, may be both affirmatively and negatively averred; for if the Bill merely sets out the plaintiff's title,

(*l*) Lord Red. 199 n.

Averments.

and does not charge the defendant with having any notice of it, the want of notice being one of the circumstances necessary to consitute the equitable bar, must be averred in the plea; in which case, according to the distinction above pointed out, the averment is affirmative. And so, if the Bill actually charges the defendant with notice, the notice must be equally denied by averment, in which case the averment will be a *negative* averment.

Negative averments.

A negative averment, therefore, is that species of averment which is made use of to contradict any statement or charge in the Bill, which, if uncontradicted, would be to do away with the effect of the matter pleaded. The most common case in which this form of averment is used, is where notice or fraud are alleged in the Bill, for the purpose of obviating some anticipated defence which may be set up by the defendant. It is to be observed that, in *Meadows* v. *The Duchess of Kingston* (*m*), the Chancellor (Lord Apsley) seemed to be of opinion that notice and fraud were to be denied by way of averment in the plea in cases only where the denial made part of the equitable defence, as in the cases of purchase for valuable consideration, where the want of notice creates the equitable bar; but in *Devie* v. *Chester* (*n*) a decree establishing a modus having been pleaded to a Bill for tithes, in which the plaintiff stated that the defendant set up the decree as a bar to his claim, and to avoid the effect of the decree, charged that it had been obtained by collusion, and stated facts tending to shew collusion, the Lord Chancellor was of opinion that the defendants, not having denied the collusion by averments in the plea, (although they had done so by answer in support of the plea,) the plea was bad in form, and he overruled it accordingly. In *Hoare* v. *Parker* (*o*), also, where the plaintiffs brought their Bill as trustees claiming quantities of plate, (described in a schedule annexed to the Bill,) against the defendant, (a pawnbroker,) with whom the plate, or part of it, was alleged to have been

(*m*) Lord Red. 223 n. Amb. 756. S. C.

(*n*) Ld. Red. 223 n. y.

(*o*) Ld. Red. 224 n. y.; 1 Bro. C. C. 578.; 1 Cox, 224. S. C.

Averments.

pledged by a person who had only a life interest in it under a will, and requiring a discovery of the particular pieces of plate pawned, in aid of an action of trover, the defendant pleaded—to so much of the Bill as sought a discovery of the plate pawned, as aftermentioned in the plea, *and of the plate specified in the schedule annexed to the Bill,*—that Mrs. Stewart, the tenant for life, had pledged divers articles of plate, at several times, for sums of money specified in the plea, which sums the defendant averred were paid to Mrs. Stewart; and he also averred, *that he had no notice of the will till after the death of Mrs. Stewart,* but he did not aver *by his plea,* that he had no plate pawned with him by Mrs. Stewart, besides the pieces pawned at the particular times mentioned in the plea, although, by his answer, he denied that he had any other: and the Lord Chancellor was of opinion, that the plea was defective in point of form. There can be no doubt, therefore, that wherever fraud or collusion, or any other matter is specifically charged in the Bill in such a manner that, if true, it would obviate the bar arising from the matter pleaded, it must be negatived by averment in the plea, as well as by answer in support of the plea.

In what cases pleas must be supported by answer.

This brings us to the consideration of the cases, in which it is necessary that a plea should be supported by an answer. We have before seen, that wherever a Bill, or part of a Bill, the substantive case made by which may be met by a plea, brings forward facts which, if true, would destroy the effect of the plea, those facts must be negatived by proper averments in the plea, otherwise they will be considered as admitted, and so deprive the defendant of the benefit of his defence. A plea, however, cannot be excepted to; and, as it is not necessary that an averment in a plea should do more than generally deny the facts charged in the Bill (*p*), the plaintiff might, if no answer were to be required from the defendant in addition to his plea, be deprived of the indefeasible right which he has to examine the defendant upon oath as to all the matters of fact stated in the Bill which are necessary to support his case (*q*). To obviate this result, therefore, the rule has been

Where equitable circumstances are charged.

(*p*) Ld. Red. 223. (*q*) Wigram, on Discovery, 21.

adopted, that if there is any statement or charge in the Bill which affords an equitable circumstance in favour of the plaintiff's case against the matter pleaded,) such as fraud or notice of title,) that statement or charge must be denied by way of answer as well as by averment in the plea (*r*). It is to be observed, that, in general, an answer in support of a plea cannot be required in those cases where such negative averments as those above stated are not necessary; where the defence can be made by a *pure* plea, that is, a plea which merely suggests matter in avoidance of the plaintiff's right to sue, as stated in the Bill, an answer in support of the plea is not required. In such a case the defendant, by his plea, admits the plaintiff's case, and so full and complete is the admission, that if, after argument, issue be joined upon the truth of the plea, and the plea be found false, there is an end of the dispute, and the plaintiff is entitled to a decree upon this implied admission of his case (*s*).

Answer in support of Plea.

Not necessary in cases of pure pleas,

The same principle also requires that a negative plea, *i. e.* a plea which merely consists of a negative averment denying the plaintiff's right, or the principal facts or circumstances upon which it is founded, should be supported by an answer in those cases, only, in which the Bill states or charges facts by way of evidence of the plaintiff's right. It is required in those cases, because the plaintiff has a clear right in equity to a discovery as to all matters within the knowledge of a defendant which would enable him to support his case (*t*), and it would be against that principle if a defendant could, by merely denying the existence of the claim, deprive the plaintiff of the means of proving its validity.

or of negative pleas.

The cases in which it is necessary that a plea should be supported by an answer have been very conveniently divided into—1st, Those where the plaintiff admits the existence of a legal bar, and charges some equitable circumstances to avoid its effect; and, 2nd, Those where the plaintiff does not admit the existence of any legal bar, but states some circumstances

In what cases an answer in support of a plea is necessary.

(*r*) Ld. Red. 212.

(*s*) Wigram on Disc. 36; Wood v. Strickland, 2 V. & B. 158; Brownsword v. Edwards, 2 Ves. 247.

(*t*) Sanders v. King, Mad. & Geld. 61; Yorke v. Fry, ib. 65; Thring v. Edgar, 2 S. & S. 274; Hardman v. Ellames, 5 Sim. 640.

Answer in support of Plea.

which may be true, and to which there may be a valid ground of plea, together with other circumstances which are inconsistent with the substantial validity of a plea (*x*).

Where the Bill expressly states a bar, and charges equitable circumstances to defeat it.

1. With respect to the first class of cases, the limits to which the plea and answer respectively extend, are plainly marked, and create no difficulty. The most simple cases of this class are those in which pleas are put in to Bills brought to impeach a decree on the ground of fraud used in obtaining it (*y*), to avoid the effect of a judgment by a Court of ordinary jurisdiction (*z*), to set aside a release (*a*), or an award (*b*), or to open a stated account (*c*). In all these cases, and others which fall under a similar principle, the Bill, having admitted the existence of a fact which, taken alone, would be conclusive against the plaintiff, and then having proceeded to state specific grounds upon which that fact, though formally or ostensibly in existence, yet ought not to have the effect of concluding the plaintiff, which ordinarily it would have, the defendant can readily decide to what he may plead, and to what he must answer (*d*). The Bill is an express guide, the plaintiff has pointed out the particular circumstances upon which he relies to overcome the anticipated bar, with regard to these the principles of Equity require a discovery (*e*).

— whether by way of substantive statement or of pretence.

It is to be observed, that it makes no difference whether the Bill be so framed that the bar should be introduced by way of substantive statement, and the equitable circumstances averred for the purpose of affording ground for relief, in setting aside the bar; or whether the bar, &c. be merely suggested as a pretence, set up by the defendant, and the equitable matter introduced, by way of charge, to avoid its effect (*f*). It sometimes, however, happens, that the plaintiff introduces the fact which would constitute the bar, in the form of a pretence, and meets it by a naked denial, without stating any circumstances to disprove it; in such cases, it seems that the

Secus where he does not charge equitable circumstances.

(*x*) Hare on Disc. 30.
(*y*) Ld. Red. 199.
(*z*) Ib. 208.
(*a*) Ib. 213.
(*b*) Ib. 211.
(*c*) Ib. 211.
(*d*) Hare on Disc. 33.
(*e*) Ib.
(*f*) Roche v. Morgell, 2 Sch. & Lef. 721.

defendant should merely plead the fact, and that there is no need of any other answer than the averments in plea (*g*).

Answer in support of Plea.

Where no ostensible bar is alleged in the Bill.

2. With respect to the second class of cases before referred to, as those in which it is necessary that a plea should be accompanied by an answer, the limits to which the plea and answer are to extend, are not so easily defined; it may, however, be laid down, as a general rule, that *where no ostensible bar be in the Bill admitted to exist, and yet the defendant would plead in bar to the Bill, he must distinguish those facts which, if true, would not invalidate or disprove his plea, and plead to the relief and discovery sought as to them, and then answer to the facts, which, if true, would disprove or invalidate his plea; and also to those matters which are specially alleged as evidence of such facts* (*h*).

The application of this rule is sometimes a matter of no inconsiderable difficulty to the pleader; but a due regard to the different description of pleas will, in some measure, assist in unravelling the difficulty. We have before seen, that pleas are divided into affirmative and negative pleas, and into that anomalous species of plea before referred to, in which a defendant re-states in his plea some matter stated in the Bill, and then meets the facts which are alleged in the Bill to defeat the bar occasioned by the matter pleaded by negative averments. With the latter class of pleas, however, we have nothing at present to do, since they are included in the first class of cases above-mentioned, in which the limits to which the plea or answer respectively extend, are plainly defined.

Application of the rule in affirmative pleas.

With respect to affirmative pleas, the difficulty of ascertaining the part of the Bill to be answered is not, in general, very great. The most simple cases of this sort are those in which the Bill, without expressly admitting or suggesting the existence of a legal or equitable bar, either by direct statement or by way of pretence, introduces facts which are inconsistent with it, obviously for the purpose of anticipating and avoiding such a defence, if set up, as where a plaintiff, for the purpose of avoiding the effect of a plea of the Statute of Limitations, without intimating such

—where the Bill tacitly admits the legal bar.

(*g*) Hare on Disc. 30.

(*h*) Ibid, 34.

Answer in support of Plea.

purpose, states circumstances which have arisen within the time of limitation, by which his claim has been admitted or revived. In such cases, a plea of the Statute of Limitations must be accompanied by an answer as to all the circumstances so stated (*h*), otherwise the circumstances so stated will be considered as admitted, and will have the effect of overruling the plea. And so where a plaintiff, in order to avoid the effect of a plea of purchase for valuable consideration, without notice, states, in his Bill, matters, the effect of which would be to shew that the defendant had notice of the plaintiff's title, the defendant must accompany his plea by an answer as to such facts. The same rule applies to all cases of a similar description; and no distinction appears to exist between cases in which the matter in avoidance of the anticipated plea is stated in the Bill by way of pretence or charge, and those in which it occurs in the original statement. Thus, if a Bill be filed for the specific performance of an agreement, to which, (if not in writing,) the Statute of Frauds would be a bar, it is usual, in order to avoid a demurrer, to state the agreement to be in writing (*i*); and, when it is so stated, it is necessary that a plea of the Statute should be supported by an answer, denying the agreement to have been in writing (*k*). And where several collateral facts are stated as evidence of the agreement having been in writing, those collateral facts must also be answered (*l*). In cases of that description, the fact of the agreement being in writing is the fact relied upon to take the case out of the Statute; and it may be introduced into the Bill, either by way of charge, or in the statement of the agreement itself, (which is, in fact, the more usual way,) but, in either case, the necessity for its being answered is the same.

In other cases.

It is true, that, in all the above cases, the bar which would be afforded by the plea appears, to a certain extent, to have been anticipated by the person who framed the bill, and who, therefore, so framed it as to avoid the bar, if set up; but the rule applies to all cases where matter is stated

(*h*) Bayley v. Adams, 6 Ves. 598.

(*i*) Whitchurch v. Bevis, 2 Bro. C. C. 559.

(*k*) Ib. 566. Vide etiam Morison v. Turnour, 18 Ves. 175; Spurrier v. Fitzgerald, 6 Ves. 548.

(*l*) Evans v. Harris, 2 V. & B. 361.

in the bill, which, if true, would negative the plea, whether stated incidentally or in anticipation of any expected defence. Thus, in *Crow* v. *Tyrrell* (*m*), where, to a Bill by a plaintiff claiming under a devise of real estate, the defendant put in a plea founded upon the Statute 32 Hen. 8, c. 2, the Court, although it considered the plea to be good in substance, held it to be defective, because the defendant had not answered a part of the Bill in which it was alleged that the ancestor of the defendant had entered upon the premises in question, and occupied them as tenant to those under whom the plaintiff derived his title. There the matter to which the answer was considered necessary, was introduced into the stating part of the Bill, without any apparent view to its being adapted to meet the defence set up. And so, in *Baillie* v. *Sibbald* (*n*), the letters which were relied upon as taking the case out of the Statute of Limitations, were introduced into the statement of the Bill, and were not apparently suggested by way of answer to an anticipated defence. *Roche* v. *Morgell* (*o*) and *Jones* v. *Davis* (*p*) also furnish strong illustrations of the principle contended for. In *Roche* v. *Morgell*, the Bill was for an account of various dealings and transactions between the plaintiff and defendant, imputing fraud and unfair dealing, and various usurious charges, overcharges, and mistakes in accounts delivered; and the defendant pleaded, in bar, a certain deed of release, founded on a general settlement of accounts between the parties. It is to be observed, that the Bill did not suggest the existence of the release, nor was it apparently framed with any view to what the effect of that instrument would have, if set up by way of plea; it merely prayed a discovery of the several transactions stated in the Bill, and a general account; but one of the reasons insisted upon by Lord Redesdale for overruling the plea was, because it was not accompanied by an answer to the charges of unfairness in the accounts, &c. His Lordship said, that, upon argument of a plea, every fact stated in the Bill, and not denied by answer,

Answer in support of Plea.

(*m*) 2 Mad. 409.
(*n*) 15 Ves. 185.
(*o*) 2 Sch. & Lef. 721.
(*p*) 16 Ves. 262.

Answer in support of Plea.

in support of the plea, must be taken as true; and he held, that the plea to the relief in that case ought to have averred, that the settled accounts upon which the release was founded, included all the dealings between the parties; that those accounts were just and fair; that the balance was justly due; and that those averments ought to have been supported by an answer to the same effect, and specially negativing all the charges of fraud, &c., imputed to the transactions by the Bill (*q*). In the case of *Jones* v. *Davis* (*r*), the Bill was filed for an account of stone taken from a certain quarry, under an agreement, set out in the Bill, by which the defendants bound themselves to pay for such stone, and to keep an account of the quantity taken; in pursuance of which, the Bill stated the defendants to have kept accounts; the defendants put in a plea denying the agreement, but not denying, by answer, the statement in the Bill as to the accounts having been kept; and Lord Eldon overruled the plea, because it did not contain a negation of the alleged accounts. In neither of those cases, therefore, were the circumstances which the Court held ought to have been answered, introduced with a view to any anticipated defence; they were merely alleged as part of the *res gesta* in the stating part of the Bill; and yet the Court held, that the plea, being unaccompanied by an answer with respect to such circumstances, ought to be overruled.

The author has been induced to enter thus fully into the point, from a circumstance of a case having been decided, by Sir John Leach, from which a contrary principle to that above laid down may be drawn. The case alluded to is that of *Pennington* v. *Beechey* (*s*), in which his Honour appears to have held, that, in order to entitle a plaintiff to an answer to such statements in his Bill as those last referred to, he ought to call the defendant's attention to them by some specific allegation. The Bill was filed for a discovery in aid of an ejectment, which the plaintiff had brought against the defendant to recover possession of an estate; and it alleged that the plain-

(*q*) Vide etiam Salkeld v. Science, 2 Ves. 107.

(*r*) 16 Ves. 262.

(*s*) 2 S. & S. 282.

tiff was entitled to the estate under a settlement made upon the marriage of his great grandfather, in 1717; and that the defendant had frequently admitted to the plaintiff's father, that he held the estate during the life only of the plaintiff's father, and that at his death the plaintiff would succeed to it. To this Bill the defendant pleaded a purchase, for a valuable consideration, from a person in possession at the time, with the usual averments negativing notice of the plaintiff's title, but did not answer the allegation as to the admission of the plaintiff's title by the defendant; and the Vice-Chancellor held the plea to be good, although it did not contain an answer as to such averment; his Honour expressing himself to the effect, that, in order to entitle him to such an answer, the plaintiff, after generally charging that the defendant had notice of his title, ought to have specially charged these admissions "as evidence thereof."

Answer in support of Plea.

It is with great diffidence that the author presumes to differ from the opinion of a Judge of such eminence as the one who decided that case; but he cannot avoid expressing a doubt as to the correctness of the above decision, which appears to him to be at variance with former decisions to which he has referred (*t*); and he is happy to think that, upon this point, his opinion is supported by that of an eminent writer on the subject of discovery (*u*). It appears to the author that, in *Pennington* v. *Beechey*, the learned Judge did not sufficiently advert to the distinction between that case and the one immediately preceding it, (*Thring* v. *Edgar* (*x*),) in which he had laid down a rule of a somewhat similar nature, with regard to the propriety of a defendant who denies the plaintiff's title by a *negative plea*, accompanying his plea by an answer as to any of the facts or circumstances stated in the Bill as constituting that title. The rule in *Thring* v. *Edgar* is this, viz., that where a defendant pleads a negative plea denying the plaintiff's title, such plea is a full bar, unless the plaintiff has sought a disovery of

Application of the rule to negative pleas.

No answer to be given as to circumstance of plaintiff's title.

(*t*) Vide Chamberlain v. Agar, 2 V. & B. 259; Roche v. Morgell; and Jones v. Davis; ubi supra.

(*u*) Wigram on Disc. 169.

(*x*) 2 S. & S. 274.

Answer in support of Plea.

circumstances by which the existence of his right can be established; but, in order that a defendant may know what the particular discovery which the plaintiff requires from him is, it is incumbent upon the plaintiff distinctly to call his attention to it in his Bill. This rule, however, is strictly applicable to *negative pleas only*, and to the form in which a discovery is to be required by the plaintiff as to matters covered by such pleas; and the author contends that it cannot, consistently with the cases before referred to, be extended, even in the case of negative pleas, to matters of any other description, and that it cannot be applied to matters which are not covered by the plea, and by that means so circircumstanced, that unless his attention had been called to it, an answer as to such matters would have been improper; or, in other words, it cannot be extended to collateral circumstances. This is evident from the case of *Jones* v. *Davis* (y), where the plea, as we have seen, consisted of a denial of the agreement set out by the Bill; but the Court held that the defendants were bound to have answered as to the circumstance of their having kept accounts, although his attention was not specially drawn to that circumstance, as one with regard to which the plaintiff was desirous of an answer.

The grounds upon which the rule in *Thring* v. *Edgar* can be supported, are, it appears to the author, obvious, when we consider that it is the office of a plea to suggest one point, which, if true, at once puts an end to the plaintiff's claim; and that one of the principal objects of pleading is to avoid the expense and inconvenience of a discovery, with regard to matters, as to which, if the plea be true, the plaintiff can have no right to call for a discovery. A plea is, in fact, as the form of it shews, a reason suggested to the Court why a defendant should not be called upon to answer the Bill, or that part of it to which the plea applies. It makes no difference whether the reason be negatively or affirmatively suggested. If a defendant, after pleading an affirmative plea, should answer any part of the Bill covered by his plea, he

(y) Ubi supra.

would be gailty of an absurdity, as he would, in effect, answer that which he submits to the Court he ought not to answer, and the consequence of such a proceeding would be that he would overrule his plea (*z*). The same principle applies to what is termed *a negative plea:* when a defendant resorts to such a plea, his object is, by simply denying the right set up by the plaintiff, or the title he makes by his Bill, to avoid the necessity of answering further as to the plaintiff's right or title, and to throw upon the plaintiff himself the *onus probandi*, in order that his suit may stand or fall by the strength or weakness of his own case, so that if the defendant were to answer to any part of that case, he would do what he seeks by his plea to avoid, namely, he would go into a discussion of the merits of the plaintiff's case. Upon this ground, Sir Thomas Plumer, V.C., proceeded in *Drew* v. *Drew* (*a*), where the defendant, in answer to a bill for an account of partnership transactions, between the plaintiff and the person whom the defendant represented, put in a plea by which he denied the existence of the partnership. It was insisted by the counsel in support of Bill, that the plea ought to have been accompanied by an answer as to a statement in the Bill, that the alleged partner had been apprenticed to the plaintiff; but the Vice-Chancellor held that it was not necessary to answer every circumstance tending to the point on which the defendant relied, and tendered an issue by his plea, and overruled the objection.

Answer in support of Plea.

But although a defendant pleading a negative plea is precluded from answering to any fact which it is the object of that plea to decline answering, yet, as the plaintiff has a right to a discovery, from the defendant, of all matters necessary to support his case, he has, consequently, a a right to compel the defendant to answer specifically to all the facts stated in his Bill, to which he considers it necessary to require an answer, in order to enable him to make out his claim by means of the evidence which may be afforded by the defendant's admission. Thus, if a Bill were to be filed, alleging a partnership, and insisting that the existence of such

— Unless a discovery as to them is necessary to the plaintiff's case.

(*z*) For. Rom. 58. (*a*) 2 V. & B. 159.

Answer in support of Plea.

partnership was made out by certain documents or by settlements of accounts and admissions, it would not be sufficient to plead to such a Bill a mere denial of the existence of the partnership (*b*); he must go further, and answer as to all the circumstances insisted upon as evidence of the partnership.

This was the principle acted upon by Sir John Leach, V. C., in *Sanders* v. *King* (*c*), where his Honour laid down the rule, that a plea which negatives the plaintiff's title, though it protects a defendant generally from answer and discovery as to the subject of the suit, does not protect him from answer and discovery as to such matters as are specially charged as evidence of the plaintiff's title. He afterwards repeated the same rule, in the case of *Thring* v. *Edgar*, before referred to, and it was acted upon both by Lord Brougham, C., and Sir Launcelot Shadwell, V. C., in *Hardman* v. *Ellames* (*d*).

— and is distinctly stated to be so in the Bill.

It is observable that in *Thring* v. *Edgar*, the learned Judge, after repeating his judgment in *Sanders* v. *King*, applies the principles of that judgment to the case before him, with this qualification, viz., *that in order that a defendant may know what is the particular discovery which the plaintiff requires from him, it is incumbent on the plaintiff distinctly to state it in the Bill.* His Honour then goes on to observe, that 'the common form of doing this is by the plaintiff's charging, as "*evidence of his title,*" the particular matters as to which he seeks a discovery from the defendant (*e*), and that, unless the defendant is distinctly informed what are the particular matters affecting the plaintiff's title, as to which he seeks such discovery, the defendant, not knowing what he is expected to answer, is not to answer at all.' The result of the case was, that his Honour overruled the plea of 'no debt,' because the defendant had proceeded to give an answer as to the circumstances under which the debt had been contracted, there being no distinct information given to the defendant, by the Bill, that the plaintiff sought any such discovery from him for the purpose of establishing the existence of the debt.

(*b*) Evans v. Harris, 2 V. & B. 361.

(*c*) Mad. & Geld. 61; vide etiam Yorke v. Fry, ib. 65.

(*d*) 5 Sim. 640, and 2 M. & K. 732, S. C.

(*e*) Gun v. Prior, 1 Cox, 197; Evans v. Harris, 2 V. & B. 361.

Answer in support of Plea.

The author is aware that the correctness of this rule has been questioned (*f*); he cannot, however, avoid expressing his opinion to be, that, if the circumstances of the case in which it was laid down are properly adverted to, it will be found to be a rule sanctioned both by authority and principle.

Rule in Thring v. Edgar.

It is to be recollected that the plea in *Thring* v. *Edgar* was strictly a negative plea, denying the existence of the debt which the plaintiff claimed to be due to him from the testator; and that the rule laid down and acted upon in the case was simply, that when a defendant denies the plaintiff's title by a negative plea, he must not accompany his plea by an answer as to any facts stated in the Bill which constitute part of such title, unless his attention is drawn to such facts by some charge or statement in the Bill, indicating that the plaintiff requires a discovery as to those facts, and what the particular facts are as to which the discovery is required. It is true that the learned Judge, in addition to laying down the rule, adds, by way of illustration, that the common form of doing this is, 'by the plaintiff's charging the particular matters as evidence of his title;' but it is by way of illustration only that those words are added; the Vice-Chancellor by no means asserts that this is the only form in which it can be done, or that 'words of equivalent import' are required (*g*), so that the rule cannot be taken, as indicating the necessity of the plaintiff's pointing out the parts of the Bill he requires to have answered, by any 'regulation-mark,' such as the words, in evidence, &c. (*h*); all that is required by the rule is, 'that in order that the defendant may know what the particular points are as to which a discovery is required, the plaintiff should call his attention to them in his Bill.'

Now, as far as the convenience of such a rule is in question, there can, it is conceived, be no doubt; and, as to the necessity of it, the author submits that it is evident, not only from the same learned Judge's former decision, in *Sanders* v. *King* (*i*), but from the judgment of Sir Thomas Plumer, in *Drew* v. *Drew* (*k*);

(*f*) Wigram on Disc. 169.
(*g*) Ibid. 171.
(*h*) Ibid.
(*i*) Ubi supra.
(*k*) 2 V. & B. 159.

Answer in support of Plea.

for if a defendant pleading a negative plea is not (as was held in that case,) liable to answer the circumstances tending to the point upon which he offers an issue by his plea, and yet the plaintiff is entitled (as there is no doubt he is,) upon the general principles of the Court, to a discovery from the defendant, as to all or any of the circumstances alleged in his Bill, to be used by way of evidence, 'to negative the negative plea,' how is the defendant to know to which of those circumstances he is bound to answer, unless the plaintiff points them out in his Bill?

It is to be remembered that in *Thring* v. *Edgar*, the question was not whether the defendant ought to have answered as to facts which were *collateral* to the plaintiff's title; but whether he ought to have answered certain facts or circumstances which were directly connected with the title, and actually formed part of it, viz., 'the manner in which the debt claimed by the plaintiff had been contracted;' and the reason why the Vice-Chancellor held he ought not to have answered them was, because the plea, by denying the debt, had thereby negatived the plaintiff's title altogether; so that all the circumstances connected with the plaintiff's title, and upon which it was founded, were covered by the plea, and could not be answered without infringing the acknowledged rule of pleading, that if a defendant answers to matters covered by his plea, his plea is thereby overruled. His Honour, however, held, that if the plaintiff had alleged in his Bill that a discovery by the defendant, as to certain circumstances connected with his title, would have afforded evidence in support of it, he would, upon a clearly recognized principle of equity, have been entitled to such discovery; but that, as he had not laid such a ground for the application of that principle, the defendant, having by his plea submitted that he ought not to make such discovery, could not be allowed to do that which his plea protested against his being called upon to do.

The rule, therefore, in *Thring* v. *Edgar*, must be held as merely prohibiting a defendant who has denied the plaintiff's title, by a negative plea, from answering as to any of the circumstances of the plaintiff's title, or which would afford *direct*

evidence of it, unless such an answer is specifically called for by the form of the Bill, and the author submits that taking this view of the rule, it is not impeached by any of the cases cited by the learned writer before referred to, as authorities 'the other way.' (*l*).

Answer in support of Plea.

The cases so cited are *Roche* v. *Morgell* (*m*), *Jones* v. *Davis* (*n*), *Chamberlain* v. *Agar* (*o*), *Crow* v. *Tyrell* (*p*), *Arnold* v. *Heaford* (*q*), *Hardman* v *Ellames* (*r*). Those cases, however, have little, if any, connexion with the point in *Thring* v. *Edgar;* the point in question, in all of them, was, whether a defendant, having protected himself by his plea from answering as to any circumstances directly connected with the plaintiff's title, was, by the same plea, protected from answering as to matters stated in the Bill, which were not directly connected with the plaintiff's title, *but were entirely collateral to it,* but which matters, if true, would have afforded evidence in favour of the case stated by the plaintiff. Thus, in *Jones* v. *Davis* (*s*), the plaintiff's title depended upon an agreement that the defendants should keep an account of stone raised in a certain quarry, and that the plaintiff should be paid for such stone at the market price; the plea negatived the agreement, and the defendant was thereby, according to the rules of pleading before adverted to, precluded from making any discovery, not only as to the agreement, but as to any of the circumstances which directly led to, or were attendant upon, its being entered into, unless his attention has been specially directed to them by the Bill, as circumstances respecting which a discovery was sought; Lord Eldon, however, held, that the defendant was not protected from making a discovery as to the facts stated in the Bill to have occurred *subsequently to the agreement,* and which, if true, would have a tendency to negative the plea, by shewing that, although the agreement was denied, the defendants had acted in the manner in which the agreement, if in existence, would have compelled them to act, viz:—that they had

(*l*) Wigram on Disc. 169.
(*m*) 2 Sch. & Lef. 721.
(*n*) 16 Ves. 262.
(*o*) 2 V. & B. 259.
(*p*) 2 Mad. 397.
(*q*) 1 M'Cl. & Younge, 330.
(*r*) 5 Sim. 640.
(*s*) Ubi supra.

Answer in support of Plea.

kept the accounts which the agreement stated in the Bill required them to keep. In *Chamberlain* v. *Agar* (r), a fact which was collaterally mentioned in the Bill, as part of the plaintiff's case, was held not to be covered by the plea which negatived the existence of a codicil, under which the plaintiff claimed: besides which, it is to be remarked, that independently of the indirect evidence which that fact, if true, would have afforded of the existence of the codicil, it was in itself made the foundation for relief. In *Arnold* v. *Heaford* (s), the Bill claimed certain property in the possession of the defendant, and, as the plaintiff's title, it stated a mortgage-deed, under which it was alleged the defendants claimed, and it expressly charged, that the property in question had been conveyed to the defendant with a knowledge of the mortgage, and that accounts were kept by them within twenty years, &c. To this Bill, the defendants pleaded a negative plea, viz:—that the indenture of mortgage in the Bill mentioned, did not comprise any premises in the defendant's occupation, or to which he claimed title; and it was held, by the Court of Exchequer, that the charges above mentioned, should have been met by a positive and direct negative. Those cases, therefore, all proceeded on the ground that the defendant had not answered as to *collateral circumstances*, and do not afford any ground for impeaching the rule in *Thring* v. *Edgar*, which, as we have seen, applies only to the parts of the Bill which are negatived by the plea, viz:—the plaintiff's title, and the circumstances directly connected with it, and not to collateral facts.

The above cases, of *Jones* v. *Davis*, *Chamberlain* v. *Agar*, and *Arnold* v. *Heaford*, are the only cases of those cited by the learned author referred to, in which the defendants had set up negative pleas, denying the plaintiff's title; in the other cases, the pleas, although they contained negative averments, were strictly *affirmative*; *i. e.* they brought forward matters, which, admitting the plaintiff's case to be true, shewed that he could not recover, by reason of the bar set up by the plea. In *Roche* v. *Morgell* (t), the plea was a general release; in *Crow* v. *Agar*,

(r) Ubi supra. (s) Ubi supra. (t) Ubi supra.

the defendant set up the Statute of Limitations, 32 Hen. 8, c. 2, in bar of the plaintiff's claim; and in *Hardman* v. *Ellames* (u), the defence insisted upon by the plea was, that the possession of the property had been adverse to the plaintiff's title for above sixty years; this defence, so far from negativing, was perfectly consistent with the plaintiff's case as set out in his Bill; and it is to be observed that, in the last case, the Lord Chancellor, as well as the Vice-Chancellor, recognized the authority of *Thring* v. *Edgar;* and that the Vice-Chancellor, though he overruled the plea, expressly stated that the plea was defective, '*not because it does not negative the circumstances that constitute the plaintiff's case, for if it did, that would overrule the plea,* but because it has so stated the nature of the defence, that no human being can comprehend what that case is': so that, as far as it goes, it is an authority in favour of *Thring* v. *Edgar*, not only by reason of the positive recognition of the rule laid down in that case, which is to be found in it, but by reason of the acknowledgment it contains of the principle upon which it is contended that *Thring* v. *Edgar* was decided, viz.—that, if a defendant accompanies his plea by an answer to any matter covered by his plea, or which by his plea he declines his answer, he overrules his plea.

Answer in support of Plea.

On the whole, it appears to the writer, that the rule in *Thring* v. *Edgar* is unimpeached by the authorities cited, and that it is founded upon the acknowledged principles of the Court. He, therefore, thinks that he is justified in stating the rule of pleading, with regard to the necessity of supporting negative pleas by answer, to be in conformity with the rule there laid down, viz.—that, where a defendant puts in a plea which has the effect of negativing the plaintiff's title, he must not, on pain of overruling his plea, accompany it by an answer to any of the facts upon which the plaintiff's title depends; unless his attention is drawn to those facts by some special charge in the Bill, pointing out to him distinctly that the plaintiff requires an answer as to such matters (v). And that

(u) Ubi supra. (v) Thring v. Edgar, 2 Sim. 274.

Answer in support of Plea.

where such special charge is introduced in the Bill, the plaintiff is bound to acccompany his plea by an answer to the facts so charged (x). To this the author ventures to add, that, although it is the common form, where a plaintiff requires a particular discovery from a defendant to support his case, to do so by charging the particular matters of which he seeks a discovery, 'as evidence of his title;' no particular form of words is necessary for that purpose, all that is necessary being the introduction into the Bill of a charge or allegation, by which the defendant may be distinctly informed, that the plaintiff seeks a particular discovery from him, and what that particular discovery is.

The author also ventures further to add, that the rule in *Thring* v. *Edgar*, is applicable only to those facts which are covered by the plea, and that with respect to *collateral* facts, or facts which are stated in the Bill, as occurring since the title of the plaintiff is alleged to have occurred, the defendant is bound to answer them whether his attention is specifically called to them or not; and that, in this respect, there is no distinction between negative pleas and pleas of any other description.

Rule with regard to answering as to documents charged to be in defendant's possession.

This brings us to the consideration of the cases in which it is necessary that a plea should be accompanied by an answer, as to deeds, papers, and other documents charged by the Bill to be in the defendant's possession, custody, or power. The necessity for such an answer, must generally depend upon the nature of the individual case; so far, however, as the matter is susceptible of a reduction into rules, the following may be stated as those by which the subject is regulated:—

In cases of pure pleas, where no fact is stated in the Bill which may avoid their effect.

1. Where a Bill states a case for the plaintiff, and charges that the defendant has in his possession, documents from which the matters aforesaid, in the Bill mentioned, or any of them would appear, and the defendant pleads a pure affirmative plea, not denying any part of the plaintiff's case, he will not be required, indeed ought not to answer, as to the possession of the

(x) Sanders v. King, 2 Mad. 61.

documents, because the documents being only charged in the Bill to be of importance, as proving the plaintiff's case, which the defendant by his plea does not controvert, the production of the documents would be unnecessary. Thus, where defendants pleaded the Statute of Limitations, but did not answer an allegation in the Bill, 'that they had in their possession books and documents relating to the matters aforesaid, or some of them,' the Vice-Chancellor held, that an objection to the plea, on the ground of the omission of such an answer, could not be sustained; he thought, that unless the allegation in the Bill had gone further, and had averred that by the documents, or some of them, t would appear that a promise had been given within six years, the mere allegation that the defendants had in their possession papers relating to the matters aforesaid, and from which, if produced, the matters aforesaid would appear, was immaterial, (there not being any charge in the Bill, of any promise having been made within six years,) and that, consequently, it was not necessary for the defendants to negative such an allegation, either by averments in their plea, or by answer in support of it (*y*).

Answer in support of Plea.

Where facts are stated or charged in the Bill which may avoid the plea.

2. It is evident, from the above case, that if the Bill had contained any allegation of a promise within six years, the Vice-Chancellor would have held, that the charge as to the documents, ought to have been answered; and it may be laid down as a rule, that *wherever the Bill states or charges any facts which are inconsistent with the defendant's plea, or which would take the plaintiff's case out of the operation of it, and charges that the defendant has in his possession documents from which the matters in the Bill mentioned would appear, then it will be necessary to accompany the plea by a discovery of the documents in the defendant's possession;* for, as the introduction of such matter in the Bill, renders it imperative on the defendant to accompany his plea by an answer as to those facts; that answer, to be complete, must extend to the documents inquired after; because, as they are charged to relate to the matters before mentioned, and the facts

(*y*) Mac Gregor v. E. I. Company, 2 Sim. 452.

Answer in support of Plea.

which go to negative the defendant's plea are amongst those matters, it may happen that the documents in the possession of the defendant, will afford important evidence to enable the plaintiff to avoid the effect of the plea. Thus, where a Bill was filed by persons claiming an estate as heirs of A. *ex-parte materna*, and the defendant pleaded that another person was the heir of A. *ex-parte paterna*, the Court overruled the plea, because it did not answer as to a correspondence, by which it was charged, in the Bill, that the defendant had admitted the plaintiff's title (z). Upon the same principle the Court proceeded in overruling the plea in ***Hardman* v. *Ellames***, before referred to (zz). The plaintiff's claim was derived under the limitations of a certain deed, and the Bill was framed to shew, that the persons from whom the plaintiff derived title, had in succession enjoyed the estate in conformity with the limitations in that deed; and it charged 'that the defendants had in their possession, &c. deeds and other documents relating to the estates, and the title thereto, and the other matters aforesaid, and shewing the truth of such matters, and particularly of the matters as to the plaintiff's pedigree, and that certain persons mentioned in the Bill, had retained possession of the estate under a term of years created by the deed and upon the trust thereof.' To this Bill the defendant pleaded, that the persons under whom he claimed possession of the estate, had enjoyed an adverse possession for above sixty years before the filing of the Bill, (the effect of which plea, the circumstance, that the persons stated had held the estate under the term of years, would have avoided by shewing that the possession of the estate had been in conformity with the limitations under the deed, since the period when the adverse possession set up by the plea commenced); and one of the grounds upon which the Vice-Chancellor, and afterwards the Lord Chancellor, upon appeal, held the plea defective, was, because it was not accompanied by an answer as to the documents, &c. It is to be observed that, in his judgment, the Lord Chancellor appears to have laid some stress upon the fact, that the allegation in the Bill was not confined to a general charge, that from

(z) Emerson v. Harland, 3 Sim. 490.

(zz) 5 Sim. 240; 2 M. & K. 732, S. C.

the documents, the several matters aforesaid, or some of them, would appear, but the fact that they would so appear was specially averred; it is submitted, however, that the mere general charge would have been sufficient to have entitled the plaintiff to an answer.

Answer in support of Plea.

But, although the general rule is, that a charge that the defendant has documents in his possession, from which the matters in the Bill stated would appear, must be answered whenever there are facts stated or charged in the Bill which are inconsistent with the plea; yet, it will not be applied to those cases where the Bill mis-states the effect of deeds which form the substance of the plea, and are stated in it. Thus, where a plaintiff claimed as heiress-at-law, of a person who had devised real estates to various persons in tail, with ultimate remainder to his own right heirs, and alleged, by her Bill, 'that the several estates tail had been determined by failure of issue, and that no valid recovery had been suffered, or if it had, that the property had been so settled, that she, the plaintiff, was still entitled as right heir of the original testator, and that it would so appear if the defendant would produce the deeds creating the tenant to the *præcipe*, and leading or declaring the uses of the recovery'; and the defendant pleaded the recovery, and set forth the substance of the deeds making the tenant to the *præcipe* and leading the uses of the recovery, under which it was apparent the plaintiff had no title; the plea was held by Sir J. Leach, V. C., to be good, although not supported by an answer as to the deeds, &c., which his honour held to be unnecessary, as the plea was, in fact, a direct denial of the averment, that the estate was so settled that the plaintiff was entitled (*a*).

Perhaps, the best course which a pleader can pursue in cases of this description in general, is, to consider how far any part of the matter alleged in the Bill partakes of the nature of *a special replication.* If the matter charged amounts only to a general denial of the facts pleaded, the discovery is not necessary; because, then, the documents sought form part of the defendant's case only, and when the cause

(*a*) Plunkett v. Cavendish, 1 R. & M. 713.

Answer in support of Plea.

comes to be heard on the truth of the case as put in issue by the plea, the plaintiff (his case being admitted by the plea,) will not require the assistance of the documents in the defendant's possession to establish his right; and the defendant will derive no benefit from his plea, unless he can prove it to be true. If, on the contrary, the charge amounts to a *special replication,* that is, to a statement of facts, which, admitting the plea to be true, goes to do away with its effect; there the documents required may be important to assist the plaintiff in making out his own case, viz.—the facts alleged in derogation of the plea;—in such cases, therefore, there must be a discovery as to those documents.

In the case of negative pleas.

3. With respect to negative pleas, the rule may be stated to be in conformity with the principles before adverted to, namely, *that if a plaintiff indicates, by his Bill, that he requires an answer as to documents alleged to be in the defendant's possession, in proof of his title, the defendant must make the discovery;* thus, if a Bill specially charges, that the defendant has in his possession documents from which the truth of the matters stated in the Bill would appear, he must, if he negatives the plaintiff's title by his plea, accompany his plea by an answer as to those documents. The plaintiff is entitled to a discovery of them, in order to enable him (in the language of Lord Brougham,) 'to negative the negative plea (*b*).' When, on the other hand, the Bill charges documents to be in the possession of the defendant, but the charge is not accompanied by an allegation, that from such documents the truth of the matters in the Bill would appear, then it is presumed that, according to the rule in *Thring* v. *Edgar*, before adverted to, it ought not be answered.

Answer in support of a plea, no part of the defence.

It may be collected from the preceding observations, that an answer in support of a plea *is no part of the defence* (*c*); the defence is the matter set up by the plea, the answer is, that evidence which the plaintiff has a right to require and to use to invalidate the defence made by the plea, and the plaintiff is entitled to make use of it, not only upon the hearing of the cause, upon the issue raised by the plea after the plea shall

(*b*) Hardman v. Ellames, 2 M. K. 744.

(*c*) Lord Red. 199. (n.) h.

have been decided to be a good bar upon argument; but upon the argument of the plea itself, before any evidence can be given (*d*), for the purpose of counterproving the plea, by reading from it any facts or admissions which may negative the matters pleaded or averred in the plea (*e*). Thus, in *Hony* v. *Hony* (*f*), where a Bill was filed by a remainder-man against a tenant for life, for an account of timber cut for a period of more than six years previous to the filing of the Bill, and for payment of the value thereof, and the defendant pleaded the Statute of Limitations in bar to such part of the Bill as sought an account, &c., for more than six years previous to the Bill filed, and answered as to the rest, the plea was overruled; because, *upon reading the answer*, it appeared that, in certain accounts, rendered by the defendant within the six years, he had given an account of the timber cut and sold from the commencement of his tenancy for life; and it was held, that a new cause of action arose whenever such an account had been rendered, so that the case was taken out of the Statute. The answer, then, being no part of the defence, but only what the plaintiff has a right to require, to enable him to avoid that defence, it follows, that it must be full and clear, otherwise it will not support the plea; for the Court will intend all matters charged in the Bill, to which the plaintiff is entitled to an answer, to be against the pleader, unlessthey are fully and clearly denied (*g*). Thus, if a Bill is filed to set aside a decree or other instrument on the ground of fraud, and the defendant pleads the decree or instrument sought to be set aside in bar, the defendant must answer the facts of fraud alleged, so fully as to leave no doubt on the mind of the Court that, upon that answer, if not controverted by evidence on the part of the plaintiff, the fact of fraud cannot be established. If the answer should not be full in all material points, the Court will presume that the fact of fraud may be capable of proof in the point not fully anwered, and will, therefore, not deem the

Answer in support of Plea.

Must be full and clear.

(*d*) Lord Red. 199. (n).
(*e*) Hildyard v. Cressy, 3 Atk. 303.
(*f*) 1 S. & S. 569.
(*g*) Lord Red. 241; Hildyard v. Cressy, ubi supra.

Answer in support of Plea.

answer sufficient to support the plea, and upon that ground will overrule the plea (*h*).

After plea allowed, plaintiff may except to answer;

But, although an answer in support of a plea is required to be full and clear, yet, if the equitable matters charged are fully and clearly denied, it may be sufficient to support the plea, although all the circumstances charged in the Bill may not be precisely answered (*i*). In such cases, however, the plaintiff is not precluded by the circumstance of the Court having held, upon the argument of the plea, that the charges in the Bill are sufficiently denied to exclude intendment against the pleader, from afterwards excepting to the sufficiency of the answer, in any point in which he may think it defective (*k*). He may also, by amending his Bill, require an answer to any matter which may not have been so extensively stated or interrogated to as the case would warrant, or to which he may apprehend that the answer, though full in terms, may have been, in effect, evasive (*l*). It is to be recollected, however, that after a plea has been allowed, the plaintiff cannot amend his Bill unless upon leave obtained on special motion (*m*).

or amend his Bill.

Of answering *in subsidium.*

It is to be observed, that the cases above referred to, as requiring that a plea should be accompanied by an answer, are those only in which some fact or matter is stated or charged by the Bill, which, if true, would have the effect of overruling the plea; there are cases, however, in which, even though no equitable circumstances are alleged in the Bill, to defeat the bar offerred by the plea, when, in fact, a *pure* plea may be pleaded; yet the defendant may support his plea by an answer, touching matters not charged in the Bill (*n*). Thus, in the case of a plea of purchase for valuable consideration, a defendant may deny notice in his answer as well as in his plea; because, by so doing, he does not put any thing in issue which he would cover

(*h*) Lord Red. 199.
(*i*) Lord Red. 241; Waters v. Glanville, Gilb. Rep. 184; 3 Bro. P. C. 373.
(*k*) Lord Red. 241.
(*l*) Lord Red. 200.
(*m*) Ante, vol. 1, 525.
(*n*) Lord Red. 237; Beames on Pleas, 77.

by his plea from being put in issue (*o*). A defendant may also, by this means, put upon the record any fact which tends to corroborate his plea, so as to enable him afterwards to prove it. An answer of this sort is termed an answer *in aid* or in *subsidium* of the plea, and differs from what is usually termed an answer in support of a plea, in being an answer which the defendant is not obliged to put in for the purpose of avoiding the effect of any equitable ground which may be alleged in the Bill, for avoiding the bar offered by the plea.

Of answers *in subsidium*.

Sect. II.

Of the different Grounds of Pleas.

A plea may be either to the relief or to the discovery, or to both. If it is a good plea to the relief, it will be also good to the discovery; in the same manner that a demurrer, which is valid as to the relief prayed, is, as has been already mentioned, good to the discovery sought by the Bill (*z*). In *James* v. *Sadgrove* (*a*), the question was agitated, 'whether a defendant, pleading to the relief, could nevertheless give the discovery sought by the Bill, without overruling his plea.' This question, as it affects a demurrer, has been before discussed; and the case of *James* v. *Sadgrove* does not carry it further. All that the Vice-Chancellor (Sir J. Leach) there decided was, that, 'admitting that a defendant may, at his pleasure, answer the whole Bill, though he pleads to the relief, it does not follow from thence that he may plead to the relief and part of the discovery only, and, at his pleasure, answer the rest of the Bill; such a partial answer can answer no useful purpose, and the rule applies here, that he who submits to answer at all, must answer fully, unless in those cases, in which, as will be hereafter shewn, he may protect himself from such discovery by plea to the discovery.'

Pleas to relief good as to discovery.

Defendant cannot plead to relief and answer as to part.

(*o*) For. Rom. 58.
(*z*) Ante, p. 24.
(*a*) 1 S. & S. 4.

Pleas to Relief.

Division of pleas to relief.

Pleas in equity to the relief prayed by the Bill have usually been ranged under the heads of pleas, 1, to the jurisdiction, 2. to the person of the plaintiff or defendant, and 3. in bar of the suit.

This arrangement is the one recognized by Lord Redesdale; and Sir George Cooper, but the learned author of the 'Treatise on the Elements of Pleas in Equity,' has added another head of plea to those before enumerated, viz., pleas to the Bill.

It appears to be the opinion of Mr. Beames, that pleas in equity are primarily divisible into pleas in abatement and pleas in bar. He observes, that, 'in a work on pleading at law, pleas are thus described:—"Pleas are of two sorts—in abatement and in bar: the former question the propriety of the remedy, or legal sufficiency of the process, rather than deny the cause of action; the latter disputes the very cause of action itself;" and that it is impossible to read this passage without perceiving how perfectly applicable it is to pleas in equity, and how strongly appropriate, as marking the distinction between pleas to the jurisdiction, to the person, and the Bill, and pleas in bar: the three former classes, while they question the propriety of the particular remedy or of the suit, tacitly concede the existence of a cause of suit; but the latter disputes the very cause of suit itself (*b*).' In this opinion the writer of the present treatise cordially concurs. It is, however, to be observed that it nowhere appears, that any practical consequence results, in equity, from the distinction between pleas in abatement and pleas in bar (*c*). At law, the distinction is important, with reference to the conclusion of the plea; but, in this Court, there is not the same difference between a plea in abatement and a plea in bar. The office of a plea in equity being merely to introduce facts which, combined with the Bill, destroy the

(*b*) Beames on Pleas, 58.

(*c*) It is stated, in Merewether v. Mellish, 13 Ves. 437, that Lord Thurlow said that he did not know what a plea in abatement in equity was. This observation, however, must have been made by his Lordship with reference to the practical results of such a distinction, for the use of the term 'plea in abatement,' as distinguished from a plea in bar, occurs in the Practical Register and many other books, and has been repeatedly used in the same manner by Lord Thurlow himself. Vide Newman v. Wallis, 2 Bro. C. C. 143; Gun v. Prior, 1 Cox, 198; 2 Dick. 657. Vide etiam Beames on Pleas, 57, *notis*.

plaintiff's case, or make it defective, the uniform conclusion of pleas is a submission that a defendant is not bound to put in any further or other answer. In the following observations, therefore, the distinction of pleas into pleas of abatement and pleas in bar, will not be further noticed, but the different grounds of pleas will be offered to the reader according to the arrangement adopted by Mr. Beames. Before we proceed, however, to a more minute discussion of pleas, according to the above distribution, it will assist the reader to point out in what respect pleas of each class differ from those of the other classes, and this will be done as briefly as possible, in the words of the learned writer himself:—

Pleas to Relief.

Pleas to the jurisdiction.

I. 'Those pleas which are commonly called pleas to the jurisdiction do not proceed the length of disputing the right of the plaintiff in the subject of the suit, or allege any disability on the part of the plaintiff to prosecute the suit, but simply assert that the Court of Chancery is not the proper Court to take cognizance of those rights (*d*).'

Pleas to the person.

II. 'Pleas to the person do not dispute the validity of the rights which are made the subject of the suit, or deny that the Court has jurisdiction over them (*e*); but they assert that the plaintiff is incapacitated to sue, or that the defendant is not the person who ought to be sued.'

Pleas to the Bill.

III. Those pleas in equity, also, which Mr. Beames distinguishes as pleas to the Bill, 'do not dispute the validity of the right made the subject of the suit, or contend that the Court has not generally jurisdiction over it, nor do they allege that the plaintiff is under any disability to sue, or that the defendant ought not to be sued; but they assert that the suit, as it appears on the record, is defective to answer the purpose of complete justice, or ought not, for some other reason, to proceed (*f*).'

Pleas in bar.

IV. 'Pleas in bar may be distinguished from all other pleas, as they admit the jurisdiction of the Court, and do not dispute the ability of the plaintiff to sue, and the liability of the defendant to be sued, and tacitly concede that there are none of those objections to the suit which constitute the grounds of

(*d*) Beames on Pleas, 55.
(*e*) Ibid.
(*f*) Ibid. 59, 60.

Pleas to Relief.

pleas to the Bill; but yet they allege matter, which, if true, destroys the claim made by the suit, and, by shewing that the right made the subject of the suit has no existence, or that it is vested in the defendant, they put an eternal end to all litigation respecting it (*g*).'

Having thus stated the leading distinctions between the different classes of pleas above pointed out, we shall proceed to consider the particular pleas to relief under each head.

I. *Pleas to the Jurisdiction.*

Pleas to the jurisdiction.

Pleas to the jurisdiction, as we have seen, do not dispute the rights of the plaintiff in the subject of the suit, but simply assert, either, 1, that they are not fit objects of cognizance in a Court of Equity, or, 2, that the Court of Chancery is not the proper Court to take cognizance of those rights.—That these are the only grounds of plea which can be put in to the jurisdiction seems to be generally admitted; for it is clear, that a plea that the subject of the suit is not cognizable in any municipal court of justice whatever, could not prevail; because such a plea would amount to nothing more than that the subject of the suit is one upon which no action or suit can be maintained, which is, in effect, a plea in bar, not a plea to the jurisdiction of a particular Court, but of all Courts; which would be absurd, and repugnant in terms (*h*).

That the subject of suit is not within the jurisdiction of a Court of Equity.

1. The generality of cases in which a Court of Equity has no jurisdiction, cannot easily be so distinguished in a Bill as to avoid a demurrer; but there may be instances to the contrary; and, in such cases, a plea of the matter necessary to shew that a Court of Equity has no jurisdiction, will hold (*i*). Thus where a Bill was filed to restrain the setting up outstanding terms in bar to an action of ejectment, a plea that there were no outstanding terms was allowed (*k*); and so it is presumed,

(*g*) Beames on Pleas, 62. 65.

(*h*) Nabob of Arcot v. East India Company, 3 Bro. C. C. 292, 302, & 1 Ves. jun. 371.

(*i*) Lord Red. 181.

(*k*) Armitage v. Wadsworth, 1 Mad. 189.

if the jurisdiction were attempted to be founded on the loss of an instrument, a plea shewing the existence of the instrument, and that it is in the power of the plaintiff to obtain the production of it, would be admissible (*l*).

Plea to the Jurisdiction.

2. A plea that the Court of Chancery is not the proper Court to have cognizance of the plaintiff's case, arises principally where the suit is for land within a county palatine (*m*), or where the defendant claims the privileges of an university (*n*), or other particular jurisdiction, such as that of the Benchers of the Inns of Court (*o*). Of this description, also, is a plea that the defendant is an officer of another Court of competent jurisdiction, and, therefore, not to be drawn from his duties in that Court for the purpose of defending a suit in another (*p*).

That the Court of Chancery has not the proper jurisdiction.

It is a rule, that, the Court of Chancery being a superior Court of general jurisdiction, nothing shall be intended to be out of its jurisdiction which is not shewn to be so (*q*). It is requisite, therefore, in a plea to the jurisdiction of the Court, both to allege that the Court has not jurisdiction. and to shew by what means it is deprived of it (*r*). It is likewise necessary to shew what Court has jurisdiction (*s*); and if the plea omits to set forth these particulars, it is bad in point of form (*u*).

Must show how Court is deprived of its jurisdiction, and what Court has jurisdiction.

It is also a rule, that a plea to the jurisdiction, must shew that the particular jurisdiction, alleged to be entitled to the exclusive cognizance of the suit is able to give a complete remedy (*v*). A plea, therefore, of privilege of the University of Ox-

(*l*) Ld. Red. 181.

(*m*) Ld. Red. 182. Vide ante, p. 32.

(*n*) Lord Red. 182. Vide Temple v. Forster, Cary, 65; Cotton v. Manning, ib. 73; Draper v. Crowther, 2 Vent. 362; Stephens v. Berry, 1 Vern. 212; Pratt v. Taylor, 1 Cha. Ca. 237; Anon. ib. 258.

(*o*) Cunningham v. Wegg, 2 Bro. C. C. 241.

(*p*) Vide Gibson v. Whitacre, 2 Vern. 83.

(*q*) Lord. Red. 182; Earl of Derby v. Duke of Athol, 1 Ves. 204; 2 Ves. 357.

(*r*) Lord Red. 182; Nabob of Arcot v. East India Company, 3 Bro. C. C. 291—301; 1 Ves. J. 371, S. C.

(*s*) Lord Red. 182; Strode v. Little, 1 Vern. 59; Earl of Derby v. Duke of Athol, 1 Ves. 202; 1 Dick. 129, S. C. See Moor v. Somerset, Nels. Rep. 51.

(*u*) Lord Red. 183; Foster v. Vassall, 3 Atk. 587; Nabob of Arcot v. the East India Company, ubi supra.

(*v*) Lord Red. 183; Newdigate v. Johnson, 2 Cha. Ca. 170; Wilkins v. Chalcroft, 22 Vin. Ab. 10; Green v. Rutherforth, 1 Ves. 463.

To the Jurisdiction.

ford, to a Bill for a specific performance of an agrement, touching lands in Middlesex, was overruled, because the University could not give complete relief (*p*). It is to be observed also, that if a suit be instituted against different persons, some of whom are privileged, and some not(*q*), or if one or more of the defendants are not amenable to the particular jurisdiction (*r*), a plea will not hold (*s*), and so if there is a particular jurisdiction, and yet the parties to litigate any question are both resident within the jurisdiction of the Court of Chancery, as upon a Bill concerning a mortgage of the Isle of Sark, both mortgagee and mortgagor residing in England, the Court of Chancery will hold jurisdiction of the cause: for a Court of Equity, *agit in personam* and may give effect to it's decree, by constraining the person or property of the defendant, till he perform it (*t*).

Only one plea to the jurisdiction.

It is said, that one plea only shall be admitted to the jurisdiction, and that, therefore, if the defendant plead such a plea, as is not sufficient in its nature, or plead the matter insufficiently, he will be put to answer (*x*).

Objection to jurisdiction must be taken either by demurrer or plea.

We have before seen, that an objection on the ground of jurisdiction must be taken either by demurrer or plea, before answer, otherwise the Court will entertain the suit, although the defendant may object to it at the hearing, unless it is in a case in which no circumstance whatever can give the Court jurisdiction (*y*).

(*p*) Draper v. Crowther, 2 Vent. 362; Stephens v. Berry, 1 Vern. 212.

(*q*) Lowgher v. Lowgher, Cary, 55; 22 Vin. Ab. 9. S. C.; Fanshaw v. Fanshaw, 1 Vern. 246.

(*r*) Grigg's case, Hutton 59; 4 Inst 213; Hilton v. Lawson, Cary, 48.

(*s*) Lord. Red. 183.

(*t*) Ib.; Toller v. Carteret, 2 Vern. 494; vide etiam, Earl of Derby v. Duke of Athol, 1 Ves. 204; Lord Cranstown v. Johnson, 3 Ves. 170, 182.

(*x*) Prac. Reg. 275.

(*y*) Ante, p. 34.

II.—*Pleas to the Person.*

Different sorts of pleas to the person.

Pleas to the person, like pleas to the jurisdiction, do not necessarily dispute the validity of the rights, which are made the subject of the suit, but object to the plaintiff's ability to sue, or the defendant's liability to be sued respecting them.

Pleas to the person of the plaintiff.

They are generally divided into such as regard the person of the plaintiff, and such as regard the person of the defendant. I. Of the former kind are pleas of,—1. Alienage; 2. Outlawry; 3. Attainder; 4. Infancy: 5. Coverture; 6. Idiotcy or lunacy; 7. Bankruptcy or insolvency; to which may be added, 8. Pleas that the plaintiff does not sustain the character he assumes. All the above grounds of objection to the person of the plaintiff, except the last, have been before discussed (*a*). With respect to the last, it is to be observed, that the plea may either deny the existence of the person in whose behalf the Bill has been exhibited, or of the character in which the plaintiff affects to sue, or it may shew that, for some reason not disclosed in the Bill, the title under which the plaintiff claims never vested in him.

Thus a plea may shew that the alleged plaintiff, or one of several plaintiffs, is a fictitious person (*b*), or was dead at the time of commencing the suit (*c*). And so if a plaintiff files a Bill stating himself to sue as administrator, a plea that he is not administrator will be good (*d*). And where a plaintiff entitled himself as administrator, and the defendant pleaded that the supposed intestate was living, the plea was allowed (*e*). A plea that the plaintiff is not heir to the person under whom he claims as heir, has also, as we have seen, been considered a good plea (*f*).

(*a*) Ante, vol. 1, chap. iii.

(*b*) Cowp. Eq. Pl. 249, cites Com. Dig. Abatement, E. 16; Bac. Ab. Abatement, F. 1. 302.; Gilb. C. P. 248; Chitty, Prac. Pl 435.

(*c*) Ib. cites Bac. Ab. Abatement, L.; Com. Dig. Abatement, E. 17; Chitty's Prac. Pl. 436.

(*d*) Winn v. Fletcher, 1 Vern. 473; Simons v. Milman, 2 Sim. 241; vide ante, v. 1, 420.

(*e*) Ord v. Huddleston, 2 Dick. 510, cited 1 Cox. 198.

(*f*) Ante, p. 98; and vide the cases cited *notis*. It seems formerly to have been doubted, whe-

Pleas to the Person.

In like manner, a plea that the plaintiff is not a partner, or a creditor has been allowed to a Bill filed by a person claiming in one of those characters (*g*). Upon the same principle, if, from any circumstance not stated in the Bill, it can be shewn that nothing ever vested in the plaintiff, or that the title which the plaintiff had, has been transferred to another, the defendant may shew the circumstance by way of plea.

Pleas to the person of the defendant.

Personal disqualification cannot be pleaded.

II. Pleas to the person of the defendant are more limited than those to the person of the plaintiff; for it seems to be a rule at law, that persons who are disabled to sue, cannot plead their own disabilities, when they are themselves sued (*h*). This rule is equally applicable to proceedings in Courts of Equity, in all cases where the suit seeks to compel the performance of a duty by the party (*i*).

Secus where proceeding is in *rem*.

Attainder or outlawry.

Bankruptcy or insolvency.

It will not, however, apply to cases where the proceeding is in *rem*, and the disability is of such a nature that, besides the personal disqualification which it imposes, the interest in the defendant's property which is the subject of the suit, has become vested in another (*k*); upon this principle it is presumed that persons outlawed or attainted of treason or felony may state their outlawry or attainder to the Court by way of plea, for the purpose of shewing that whatever interest they had in the property is vested in the Crown (*l*); in the same manner that bankrupts or insolvent debtors may, if sued respecting property which has become vested in their assignees, plead their bankruptcy or insolvency in abatement of the suit (*m*). In fact such a plea amounts to no more than a plea of want of interest in the subject matter of the Bill.

Coverture.

The rule, that a person who is under disabilities cannot plead his own disqualification, will not extend to cases where the disqualification is only partial; thus it seems that a woman, sued as a *feme sole*, may plead that she is *covert* (*n*).

ther it was not necessary in such cases to state in the plea who was the heir at law, but it seems now to be established, that such a statement is unnecessary; Jones v. Davis, 16 Ves. 264, 265.

(*g*) Ante, p. 99.

(*h*) Beames on Pleas, 122.

(*i*) Ante, v. 1, 255.

(*k*) Turner v. Robinson, 1 S. & S. 3.

(*l*) Ante, v. 1, 256.

(*m*) Turner v. Robinson, 1 S. & S. 3.

(*n*) Beames on Pleas, 130.

Pleas to the Person.

That he is not the person or does not sustain the character alleged.

A defendant may also plead that he is not the person he is alleged to be, or does not sustain the character he is stated to bear, such as heir, executor, or administrator (*o*).

That he is not sole heir, executor, or administrator.

He may likewise shew, that he is not *sole* heir, executor, or administrator, and that others are joined with him in those capacities (*p*); such a plea, however, partakes more of the nature of a plea for want of parties than of a plea to the person.

That he has no interest,

If a defendant has not that interest in the subject of a suit which can make him liable to the demands of the plaintiff, and the Bill alleging that he has or claims an interest, avoids a demurrer, he may plead the matter necessary to shew that he has no interest (*q*). Thus where a witness to a will was made a defendant to a Bill brought by an heir at law, to discover the circumstances attending the execution, and the Bill contained a charge of pretence of interest by the defendant; though a demurrer for want of interest was overruled, because it admitted the truth of the charge to the contrary in the Bill, yet the Court expressed an opinion that the defence might have been made by plea (*r*).

not proper where defendant may disclaim.

It is to be observed, that a plea of want of interest in the defendant is proper only where the case is such that he cannot satisfy the suit by general disclaimer (*s*).

III.—*Pleas to the Bill.*

Pleas to the Bill.

It has been already stated, that the object of pleas to the Bill, is to shew that, although the plaintiff may be entitled to the relief he asks against the defendant, he is not entitled to have it in that suit; or that the Bill, as framed, is insufficient to answer the object.

Plea of former suit depending.

1. Where a Bill seeks relief, a defendant may plead that there is another suit already depending, in this or in another Court of

(*o*) Lord Red. 191.
(*p*) Beames on Pleas, 130.
(*q*) Lord Red. 191.
(*r*) Plummer v. May, 1 Ves. 426; vide etiam, Cartwright v. Hately, 3 Bro. C. C. 239; 1 Ves. J. 293, S. C.
(*s*) Lord Red. 191, vide post Chap. xv.

Pleas to the Bill.

Equity for the same matter (*a*). This plea corresponds with the *exceptio litis pendentis* of the civilians, and is analogous to the pleas, at common law, that there is another action depending (*b*).

Suit must be for the same matter,

It must be obvious, that in order to the validity of such a plea the suit pleaded must be for the same matter as that embraced by the Bill to which it is put in, and as the identity of the object is the only matter put in issue by this plea, (the fact of the pendency of the suit being provable by inspection of its own proceedings,) the Court has ordered, that, instead of the defendant being required to set it down with the register, the plaintiff, if he is not satisfied therewith, must procure an order to refer it to one of the Masters of the Court, to certify the truth thereof; whereupon, if it be determined against the plantiff, the Bill will be dismissed, and he must pay the costs to the defendant (*c*).

but second suit need not be for the whole of the same matter.

But although it is necessary, that the first suit should be for the same matter as the second, it is not requisite that the second suit should be the whole matter embraced by the first (*d*), it is, however, requisite that the whole effect of the second suit should be attainable in the first (*e*); and if after the plea has been set down for argument, it appears upon the face of the plea that this is not the case, the Court will at once overrule the plea (*f*). It sometimes, however, happens, that the second Bill embraces the whole subject in dispute, more completely than the first; in such cases the practice appears to be to dismiss the first Bill with costs, and to direct the defendants in the second cause to answer, upon being paid the costs of a plea allowed which puts the case upon the second Bill in the same situation that it would have been in if the first Bill had been dismissed before the filing of the second (*g*).

(*a*) Lord Red. 201; Coop. Eq. Pl. 272; Beames on Pleas, 134; Orders in Cha. Ed.; Beames, 26, 176.

(*b*) Beames on Pleas, 134; Coop. Eq. Pl 272.

(*c*) Beames's Orders, 176.

(*d*) Moor v. Welsh Copper Co. 1 Eq. Ca. Ab. 39.

(*e*) Law v. Rigby, 4 Bro. Cha. Ca. 60; Pickford v. Hunter, 5 Sim. 122.

(*f*) Pickford v. Hunter, ubi sup.

(*g*) Crofts v. Wortley, 1 Cha. Ca. 241; Lord Red. 203.

Pleas to the Bill.

A plea of another suit depending will be good; whether the other suit be in this or any other Court of Equity in England (*i*); it will not, however, be a good plea, if it is depending in a Court in another country; therefore, such a plea will not prevail where the suit already depending is in Ireland (*k*), or in the colonies (*l*). Where the original suit has been commenced in a Court of inferior jurisdiction, the plea will not be good if the defendant has avoided the effect of the suit, by going out of the jurisdiction of that Court (*m*).

Not good, if suit in another country, or in an inferior jurisdiction, where defendant has removed,

A suit pending, to afford a good ground for a plea in equity, must be a suit in a Court of Equity; and, therefore, where an infant legatee sued an executor in the Ecclesiastical Court, and afterwards in Chancery, it was held that the suit depending in the Ecclesiastical Court could not be pleaded to the suit in Chancery, because there is not the same security for an infant's advantage in the Ecclesiastical Court as in Chancery (*n*).

must be a suit in a Court of Equity; not in an Ecclesiastical Court;

It appears to have been held, formerly, that if after a suit commenced at common law, a Bill should be exhibited, in this Court, to be relieved for the same matter, the dependency of the action at law might be admitted as a good plea, and the defendant would not be put to a motion for an election or dismission (*o*). The practice in this respect, has, however, undergone a material alteration; and now, if a plaintiff sues a defendant at the same time and for the same cause at common law and in equity, the defendant, after full answer put in, must apply to the Court for an order that the plaintiff may make his election where he will proceed, and cannot plead the pendency of

or in a Court of Law; when defendant is sued both at law and in equity, Plaintiff may be compelled to elect.

(*i*) Lord Red. 201. Upon referring to the cases which have been usually cited to prove that pleas of another suit, depending in the Court of Exchequer, will not be good to a suit in the Court of Chancery, viz., Lord Newburgh v. Wren, 1 Vern. 220; Coysgarne v. Jones, Amb. 613; Bullock v. Bullock, 3 Swanst. 698; it will be found that none of these bear out the proposition, the plea in each having been overruled, on the ground that the suit in Chancery was best calculated to afford justice to the parties.

(*k*) Lord Dillon v. Alvares, 4 Ves. 357.

(*l*) Foster v. Vassall, 3 Atk. 587; vide etiam Bayley v. Edwards, 3 Swanst. 703.

(*m*) Lord R. 201.

(*n*) Howell v. Waldron, 2 Ch. Ca. 85.

(*o*) Beames' Orders, 177.

Pleas to the Bill.

the suit at common law, in bar of the suit in equity (*p*). If after such an order the plaintiff shall elect to proceed in equity, the Court will restrain his proceedings at law by injunction, and if he shall elect to proceed at law, the Bill will be dismissed (*q*). It is to be observed, however, that if, after such election, the plaintiff should fail at law, the dismission of his Bill will be no bar to his filing a new Bill for the same matter (*r*).

No reference to Master, to inquire whether another suit depending without plea.

It is stated, in an anonymous case in Mosely (*s*), that the objection that another suit is depending for the same matter, may, in the Court of Chancery, be taken by motion instead of plea; but, in *Murray* v. *Shadwell* (*t*), Lord Eldon said, that, according to the practice, the regular way of obtaining this reference is by plea. There are cases, however, in which the Court will interfere to restrain a second suit brought against the defendant, for the same matter, upon motion, without requiring him to plead the pendency of the former suit; as in the case of two or more suits, instituted on behalf of an infant for the same matter; in such case, the Court will, as we have seen, upon representation of the fact, immediately direct an inquiry which suit is most for the infant's benefit, without requiring the defendant to plead the pendency of another suit (*u*). It is to be observed, however, that in the case of suits instituted on behalf of infants, the reference is not to inquire into the fact of two or more suits having been instituted, but which of them is most for the benefit of the infant.

In what cases a second suit will be suspended without plea.

Bills on behalf of infants.

Creditors' suits after decree.

In the case, also, of creditors suing an executor or administrator, after a decree for an account at the suit of other creditors, the Court will, upon motion by the defendant, stay the proceedings in the second cause, without requiring him to plead the pendency of the first suit (*x*); but, although that may be a proper course to be adopted, where the plaintiff in

(*p*) Lord Red. 204, Jones v. Earl of Strafford, 3 P. Wms. 90; for more on the subject of election to proceed at law or in equity, vide post, "Interlocutory Applications."

(*q*) Ibid; and vide Mousley v. Basnett, 1 V. & B. 382, n.; Fitzgerald v. Sucomb, 2 Atkins, 85.

(*r*) Lord Red. 204; Countess of Plymouth v. Bladon, 2 Vern. 32.

(*s*) Mos. 268.

(*t*) 17 Ves. 353.

(*u*) Ante, vol. 1, 95.

(*x*) Paxton v. Douglas, 8 Ves. 520.

Pleas to the Bill.

the second cause has not made himself *quasi* a party to the first, by going in to prove his debt under the decree, there can be no doubt that either course is open to the defendant (*y*), and that, in some cases, that of a plea may be most advantageous to him.

Former suit need not be between the same parties.

It is not necessary to the sufficiency of a plea of this nature, that the former suit should be precisely between the same parties as the latter: for if a man institutes a suit, and afterwards sells part of the property to another, who files an original Bill touching the part so purchased by him, a plea of the former suit depending, touching the whole property, will hold although filed by a different plaintiff (*z*). So where one part-owner of a ship, filed a Bill against the ship's husband for an account, and afterwards the same part-owner and the rest of the owners filed another Bill for the same purpose, the pendency of the first suit was held a good plea to the last (*a*); for, although the first Bill was insufficient for want of parties, yet, by the second Bill, the defendant was doubly vexed for the same cause; and where a decree has been made upon a Bill, brought by a creditor on behalf of himself and all other creditors, and another creditor comes in before the Master, to take the benefit of the decree and prove his debt, and then files a Bill on behalf of himself and all other creditors, the defendant may plead the pendency of the former suit, for a person coming in before the Master, under a decree, is *quasi* a party (*b*). The proper way for a creditor to proceed, if the plaintiff in such original suit is dilatory, is by application to the Court for liberty to conduct the cause himself (*c*).

It was said by Sir John Leach, V. C., in ***Houlditch* v. *The Marquis of Donnegal*** (*d*), that the pendency of another suit for the same object in a court of concurrent jurisdiction, could not be pleaded in bar before a decree in such other suit: this observation, however, can only be applicable to creditors' suits, where, as in the case last put, the plaintiff in the second suit

(*y*) Pickford v. Hunter, 5 Sim. 122.

(*z*) Lord Red. 202; Moor v. Welsh Copper Company, 1 Eq. Ca. Ab. 39.

(*a*) Durand v. Hutchinson, cited Lord Red. 202.

(*b*) Neve v. Weston, 3 Atk. 557.

(*c*) Lord Red. 203.

(*d*) 1 S. & S. 491, 492.

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will not have become *quasi* a party to the first till after the decree. In other cases, all that seems to be necessary to a plea of this nature is, that there should be a suit actually pending (*e*), for which purpose there need not have been more than either an appearance or process requiring appearance (*f*). That one or other of such steps, at least, should have been taken, is, however, absolutely necessary (*g*).

Former suit depending, cannot be pleaded to a cross-bill.

It is to be observed, that a cross-bill, although between the same parties as an original suit, cannot be met by a plea of this nature; thus it has been held that, after a Bill brought in the Exchequer to foreclose a mortgage, the defendant may bring a Bill in the Court of Chancery to redeem, and the pendency of the former suit is not pleadable (*h*); and it seems such a plea will not lie in any case where a decree, dismissing the original suit, would not be a bar to a new proceeding; thus where a plaintiff mistook his right, and being the executor of an administrator, conceived himself to be the personal representative of a deceased person, and filed a Bill in that capacity, but afterwards, finding that he did not properly sustain the character he had assumed, obtained letters of administration *de bonis non*, and filed a new Bill, a plea of the former suit depending was overruled by Lord Hardwicke (*i*); and it has also been held, that a suit by a husband and wife against the trustees of the wife's separate property, cannot be pleaded in bar to a subsequent suit by her and her next friend against the trustees and her husband, although the relief prayed in both suits is the same, because the first suit is considered as the suit of the husband alone, and a decree of dismission in it would be no bar to the wife (*k*).

Averments,

From what has been before said, it is obvious that it is necessary to the validity of a plea of a former suit depending, that it should contain a distinct averment that the second suit

(*e*) Lord Red. 201. 237

(*f*) Anon. 1 Vern. 318.

(*g*) Moor v. Welsh Copper Company, 1 Eq. Ca. ab. pl. 14, 39.

(*h*) Ld. Newburgh v. Wren, 1 Vern. 220.

(*i*) Huggins v. York Buildings Company, 2 Atk. 45.

(*k*) Reeve v. Dalby, 2 S. & S. 464. This case has since been confirmed by a decision of Lord Langdale, M. R., in a case where a demurrer was put in to a Bill, relating to a woman's separate estate, filed by herself and her husband and allowed, because the husband was improperly joined as a co-plaintiff. Wake v. Parker, 2 Keen, 59.

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is for the same matter as the first; and, therefore, a plea which did not expressly aver this, though it stated matter tending to shew it, was considered as bad in point of form, and was overruled upon argument (*l*). The plea must also aver that there have been proceedings in the suit, as appearance or process requiring appearance at the least (*m*). It seems likewise regular to aver that the suit is still depending (*n*), though it has been held that a positive averment of that fact is not necessary (*o*). It is, however, necessary that the time when the suit was instituted should be distinctly averred, and where a plea merely stated that in or about such a year the plaintiff filed his Bill, &c., praying the like account, and the same relief with the present, Lord Hardwicke held the plea to be defective in form (*p*.)

must not be set down for argument,

A plea of a former suit depending, being clearly a good plea, if true, the usual course of the Court is not to argue the plea, but for the plaintiff to apply to the Court to have it referred to one of the Masters to look into both suits, and to report whether or not they are for the same matter (*q*); and it has been held, that if, instead of taking that course, the plaintiff sets down the plea for argument, he admits the fact that a former suit for the same matter is depending, and the plea must therefore be allowed, unless it is defective in form. If, however, the plaintiff considers the plea defective in form, he may set it down for argument. The defendant need not, in any case, set the plea down; and if he does so, the plea will be struck out. If the plaintiff omits to set the plea down or procure a reference to the Master, and a report within a month after the plea is filed, the defendant may move to dismiss the Bill with costs (*r*). If the Master, upon such reference, reports to the Court that both suits are for the same matter, the plea is then allowed; but if he reports otherwise, the plea will be overruled. Where, however, it appeared by the Master's report, that the second suit embraced more ob-

unless defective in form.

(*l*) Lord Red. 201; Devie v. Ld. Brownlow, 2 Dick. 611. S. C.
(*m*) Lord Red. 207.
(*n*) Ibid.
(*o*) Urlin v. Hudson, 1 Vern. 332.
(*p*) Foster v. Vassall, 3 Atk. 587.
(*q*) Beames' Orders, 176, 177; Urlin v. Hudson, ubi supra; Anon. 1 Ves. jun. 484.
(*r*) Baker v. Bird, 2 Ves. J. 673.

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jects than the first, a special order was, as we have seen, made, dismissing the first Bill with costs, and directing the defendant to answer the second, upon being paid his costs as upon plea allowed (*s*).

Where a defendant, instead of moving to dismiss the Bill at the end of the month, conceiving that the rule above stated was obsolete, set the plea down for argument, it was, nevertheless, held, that he was not precluded from having the benefit of the rule, and the plea was accordingly struck out of the paper, and the Bill, upon motion made at the following seal, dismissed with costs (*t*). Where, however, a plaintiff after a plea of another suit depending to part of the Bill, and an answer to the rest, without moving for the usual references, replied generally to the answer, without noticing the plea, and witnesses were examined on both sides, and the cause heard and decided in favour of the plaintiffs, the defendant, who petitioned for a rehearing, was held to have waived his plea, and was not allowed to avail himself of the objection arising from the plaintiff's irregularity (*u*).

Not put in upon oath.

As the pendency of a former suit, unless admitted by the plaintiff, is made the immediate subject of inquiry by one of the Masters, a plea of this kind is not put in upon oath (*x*).

Plea, that the Bill is insufficient to answer the purpose of complete justice.

2. A plea, which offers any matter tending to shew that the Bill, as framed, is insufficient to answer the purposes of complete justice, must, it is evident, be ranked amongst pleas to the Bill; for it does not, in general, dispute the right of the plaintiff, as stated in the record, but merely offers a reason why the suit should not proceed as framed. This objection ge-

(*s*) Supra, p. 144.

(*t*) Bird v. Bird, 2 Ves. J. 672.

(*u*) Lucas v. Holder, 1 Eq. Ca. Ab. 4.

(*x*) Urlin v. Hudson, 1 Vern. 332; Ld. R. 202. It is not very distinctly expressed in the books, whether the rule that a plea of this nature need not be upon oath, will apply where the suit already pending is in another Court. The reason for its adoption, in cases where the suit is in the Court itself, is sufficiently evident when we consider that the pendency of it must be apparent from its own proceedings, of which the Court always takes notice, without further evidence; but with respect to proceedings in another Court, (unless they are in the state of perfect records, which can hardly be the case when the suit is still pending,) the fact of the pending of the suit must be established by evidence upon oath in the usual manner. Vide post sect. 3, "Of the Form of Pleas."

nerally arises from want of sufficient parties to the Bill: there can be no doubt, however, that if it can be shewn to the Court, that with the parties already before it, the suit has been so framed as to be insufficient to answer the purpose of complete justice, a plea suggesting the facts necessary to make such a case would prevail. The writer, however, is not aware of the existence of any case in the books, in which such a plea is discussed; and the only pleas to be found which can be ranked under this head, are those of want of parties.

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by reason of want of parties.

The question of necessary parties to a suit, has been before so fully discussed, that it is unnecessary to enter any further into it in this place (*y*). It is merely requisite to remind the reader, that when the defect is not apparent upon the face of the Bill, it may be pointed out to the Court by plea, the peculiarities arising from which course of proceeding have been before made the subject of inquiry (*z*).

IV. *Pleas in Bar.*

Division of pleas in bar.

Whatever shews that there is no right which can be made the subject of suit, or whatever is a complete and perpetual bar to the right sued for, may constitute the subject of a plea in bar, or, as it is expressed in a work on pleadings at law, 'Whatever destroys the plaintiff's suit, and disables him for ever from recovering, may be pleaded in bar' (*a*).

(*y*) Ante, Chap. v.

(*z*) Ante, vol. 1, 386.

Mr. Beames adds to the number of pleas to the Bill two others, viz., pleas that the plaintiff unnecessarily multiplies suits, and that the Bill confounds distinct matter; but it does not appear to the author that such matters can be properly considered as the subject of pleas. It is difficult to see how a plaintiff can be guilty of unnecessarily multiplying suits, unless it be framing his Bill so that it will be insufficient to answer the purposes of complete justice, in which case it will come under the class of pleas last mentioned; or by instituting a second suit, when there is another already depending for the same matter, which is a ground of plea that has been already noticed. With respect to the confusion of distinct matters in the same Bill, it is so very unlikely that a Bill should be so artfully framed, that such a defect should not appear upon the face of it, so as to render it open to demurrers, (vide Ld. R. 180), that the writer does not think it necessary to take any further notice of this ground of plea than is contained in the present note.

(*a*) Beames on Pleas, 160.

Pleas in Bar.

Pleas in bar are usually ranked under the heads of, 1st, Pleas of Acts of Parliament; 2d, Pleas of matters of record, or as of record, in the Court itself, or some other Court; and, 3d, Pleas of matters *in pais* (*c*).

Pleas of Acts of Parliament.

Any statute, public or private, which may be a bar to the demands of the plaintiff, may be pleaded, with the averments necessary to bring the case of the defendant within the statute, and to avoid any equity which may be set up against the bar created by the statute (*d*).

Statute of Limitation.

Amongst other statutes, which may be thus set up in bar of the plaintiff's demands, may be mentioned the various statutes which have, from time to time, been passed for the limitation of the time within which actions or suits at law may be commenced. Pleas of this description are called Pleas of the Statute of Limitations; and the Statute which, until recent enactments, afforded the most ordinary ground for pleas of this sort, was the 21 Jac. 1, c. 16 (*e*). By that Act, sect. 1, it is enacted, that all writs of formedon must be sued out and all entries into lands by persons having a right of entry, must be made within twenty years next after the title to the person suing out the writ or making the entry accrued; and, by sect. 3, all actions upon the case, (otherwise than for slander,) or for account, (other than such accounts as concern the trade of merchandize, between merchants and merchants, their factors, or servants,) and all actions for trespass, debt, detinue, replevin, &c., and the action of trespass *quare clausum fregit*, were to be commenced within six years next after the cause of such action or suit, and not after. This Statute, although its provisions apply only to actions or suits at law, has, nevertheless, been considered as available as a bar to suits in equity for analogous purposes, in cases where they were not commenced within the period limited by the above section (*f*); therefore, where a plaintiff's right to lands had accrued thirty years before the filing of the Bill, the Court allowed a plea of the

In what cases 21 Jac. 1, c. 16, may be pleaded.

(*c*) Beames on Pleas, 160; Coop. Eq. Pl 251 The arrangement adopted by Lord Redesdale is somewhat different. Vide Ld. Red. 192.

(*d*) Lord Red. 221.

(*e*) Vide etiam 9 Geo. 4, c. 14.

(*f*) Vide Lord Red. 218, and notis; Coop. Eq. Pl 251, and notis; Beames on Pleas, 161, and notis.

Statute of Limitations to prevail, the plaintiff having been so circumstanced, that although he could not bring an ejectment, might have brought a Bill in Equity. And so it has been held, that the Statute of Limitations, 21 Ja. 1, c. 16, might be pleaded to a Bill to redeem a mortgage, if the mortgagee had been in possession twenty years (*g*).

It has also been held, that the Statute may be pleaded in bar to a Bill for a discovery, and to prevent the setting up of outstanding terms in bar to a plaintiff's recovery at law (*h*); though such a plea would not hold to a mere Bill for a discovery (*i*).

The above Statute may also be pleaded to a Bill which seeks the payment of a debt, provided such debt be due upon simple contract. It appears, formerly, to have been considered, that although the Statute is a bar to the claim of a debt, it would not operate as a bar to the discovery when the debt was due; for if that had been set forth, it would have appeared to the Court whether the time limited by the Statute had elapsed; but later decisions have been to the contrary, and a defendant pleading the Statute, must not answer to that part of the Bill, which calls upon him to set out when the debt became due (*k*). If, however, the Bill alleges that if the defendant would discover books, papers, &c., in his possession, the plaintiff would thereby be enabled to shew that the debt became due, or was acknowledged, since the period limited by the Statute, the defendant must answer that part of the Bill (*l*).

The Statute 21 Ja. 1, c. 16, may also be pleaded to all Bills for account, except where the account relates to the trade of merchandize between merchants, which species of account is, as we have seen, expressly excepted out of the Statute. Thus, where one had received the profits of an infant's estate, and, after six years had elapsed from his coming of age, the infant brought a Bill for an account, the Court held that the Statute

(*g*) Lord Red. 220; Coop. Eq. Pl. 256; Beames on Pleas, 162. Now, however, the Statute properly applicable to lands, rents, redemption of mortgages, &c., is the 3 & 4 Wm. 4, c. 27. Vide post.

(*h*) Jeremy v. Best, 1 Sim. 373.

(*i*) Hindman v. Taylor, 2 Bro. C. C. 7.

(*k*) Lord Red. 218.

(*l*) Ante, p. 120.

Pleas in Bar.

of Limitations was a bar to such suit, as it would be to an action at common law for the same purpose (*m*).

It is to be observed, that, notwithstanding the exception as to merchants' accounts in the third section, it has been held that the Statute of Limitations will not operate as a bar, where the accounts have ceased six years before the filing of the Bill (*n*).

In *Jones* v. *Pengree* (*o*), it was doubted whether transactions between principal and agent came within the exception in favour of merchants' accounts. It has been decided that transactions with a foreign Prince and his government do not concern the trade of merchandize within this statute (*p*); and also that a letter of attorney from a merchant to authorize the getting in of debts, will not constitute the person thereby deputed a merchant, within the meaning of the exception (*pp*). It may be mentioned, that the exception has been considered as applying only to merchants trading beyond sea, and not to inland merchants (*q*); the clause relating to merchants' accounts, also, is only applicable to cases where there are mutual accounts and reciprocal demands between two persons; it is inapplicable to accounts between a tradesman and his customer, and it has been determined that, in such accounts, and in all other where the items are all on one side, the circumstance of the last item happening to be within six years, shall not draw after it those which are of a longer standing (*r*). In such cases the proper course is, to plead the Statute as to all the items which are within the Statute, and answer as to the rest.

Trusts not within the 21 Jac. 1, c. 16.

The Statute of Limitations, 21 Jac. 1, c. 16, cannot be pleaded in bar to a trust (*s*); and upon this ground it was held, that a demand upon the separate estate of a married woman was not barred, because all the separate estate of a feme

(*m*) Lockey v. Lockey, Prec. in Ch. 518

(*n*) Welford v. Liddel, 2 Ves. 400; Crawford v. Liddel, cited 6 Ves. 582; Jolliffe v. Pitt, 2 Vern. 694; Bridges v. Mitchell, Gilb. Rep. 224; Bunb. 217; Barber v. Barber, 18 Ves. 286.

(*o*) 6 Ves. 580.

(*p*) Sturt v. Mellish, 2 Atk. 612.

(*pp*) Ibid.

(*q*) Sherman v. Withers, 1 Ch. Ca. 152; and vide Beames on Pleas, 163, n. 3, and the cases there cited.

(*r*) Coop. Eq. Pl. 253; Bull. N. P 149.

(*s*) Hollis's case, 2 Ventr. 341; Sheldon v. Wildman, 2 Cha. Ca. 26, 2 Freem, 156.

covert is a trust (*t*). Upon the same principle, it is held, that where a debtor creates, by his will, a trust or charge for the payment of his debts, such a trust will prevent a Statute from operating upon a debt not barred at the time of the creation of the trust (*u*) And it makes no difference whether the trust be of real or personal estate (*v*). It seems, however, that a devise for the payment of debts will not have the effect of reviving debts barred, by the Statute, upon the death of the devisor (*w*).

It may also be noticed that, in *Andrews* v. *Brown* (*x*), it was held, that although, if a man has a debt due to him, and has made no demand of it for six years, he is barred by the Statute of Limitations; yet, if the debtor, after the six years, publish an advertisement in the Gazette, or any other newspaper, that all persons who have any debts owing to them from him, will apply to such a place that they will be paid, the operation of the Statute will be defeated; and in *Jones* v. *Scott* (*y*) before referred to, the question was discussed, whether such a notice, by a personal representative, would have the same effect. In that case, however, the Court did not come to any express decision upon the point, though Lord Brougham appears to have intimated an opinion that it would. It is to be observed that, in *Jones* v. *Scott*, the advertisement requested all persons having claims on the estate, to send in their statements prior to their being laid before a particular person, by whom the persons claiming were to submit to be examined; and that, (according to the reporter's marginal note,) the Court appeared to think that such an advertisement would not take a debt, previously barred, out of the operation of the Statute.

The principle upon which the rule, that the creation of a trust for the benefit of creditors, will prevent the application of the Statute of Limitations, is founded, has been extended

(*t*) Norton v. Turvill, 2 P. Wms. 144.

(*u*) Burke v. Jones, 2 V. & B. 275, and the cases there referred to; Hughes v. Wynne, 1 Turn. & Russ. 307; Hargreaves v. Michell, 6 Mad. 326; Rendell v. Carpenter, 2 Y. & J. 484; Jones v. Scott, 1 R. & M. 255.

(*v*) Jones v. Scott, ubi supra.

(*w*) Burke v. Jones, 2 V. & B. 275, and the cases there cited. Vide etiam Executors of Fergus v. Gore, 1 Sch. & Lef. 107; Stackhouse v. Barnston, 10 Ves. 453; Exparte Roffey, 19 Ves. 468; Stanton v. Knight, 1 Sim. 482.

(*x*) Prec. in Cha. 385.

(*y*) Ubi supra.

Pleas in Bar.

to proceedings in bankruptcy, where a commission has been held, to create a trust for the benefit of creditors; and, therefore, it has been determined that, after a commission issued, the Statute of Limitations does not prevail against the creditor of a bankrupt (z). It has also been held, that where a man has taken advantage of the Act for the relief of Insolvent debtors, the Statute will not apply; and it has been determined that, where a person who had taken the benefit of the Act twice had died, leaving assets more than sufficient to pay all the debts contracted after his second insolvency, the debts scheduled under his first insolvency, were not barred by the Statute (a).

A decree for the payment of debts, under a creditor's Bill for the administration of assets, is also considered as a trust for the benefit of creditors, and will, in like manner, prevent the Statute from barring the demand of any creditor coming in under the decree (b); the creditor's demand, however, must not have been barred at the time when the suit was instituted, for, if the creditor's demand would have been barred by the Statute before the commencement of the Bill, the Statute may be set up (c).

It is to be remarked upon this point, that it is the decree only which creates the trust, and that the mere circumstance of the Bill having been filed, although it may have been pending six years, will not take the case out of the Statute (d). And if the Bill is dismissed, the pendency of the suit will not prevent the defendant, in a new suit, from taking the benefit of the Statute (e),

It may be noticed in this place, that, in *Exparte Dewdney* (f), it was laid down by Lord Eldon, that, in the administration of assets under a creditor's Bill, executors are not bound to plead the Statute of Limitations (g); but that, if they did not, the

(z) Exparte Ross, 2 Glyn & J. 46.

(a) Barton v. Tattersall, 1 Russ. & M. 237.

(b) Sterndale v. Hankinson, 1 Sim. 393.

(c) Shewen v. Vanderhorst, 1 R. & M. 347.

(d) Lake v. Hayes, 1 Atk. 281; Anon. 2 Atk. 1.

(e) Sterndale v. Hankinson, 1 Sim. 397.

(f) 15 Ves. 498.

(g) Lord Castleton v. Fanshaw, 1 Eq. Ca. Ab. 305.

Pleas in Bar.

creditor filing the Bill would have a decree on behalf of himself and all other creditors, and would be paid; but that the constant course of the Master's Office was to take the objection against the other creditors: this rule has since been discussed in *Shewen* v. *Vanderhorst* (*h*), where the Statute of Limitations not having been taken advantage of by the executors, the objection was taken by the plaintiff, who was a residuary legatee; and the Lord Chancellor, (Lord Brougham,) held, that after a decree for an account of debts, &c. had been pronounced, and the Court by that means had taken possession of the estate, the Statute of Limitations might be set up in the Master's Office, as well by a creditor or legatee, as by a personal representative (*i*).

Whether the Master himself is bound to take the objection, is a question which was discussed in the above case, but his Lordship declined giving any opinion upon it.

How far the Statute of Limitations will apply, in cases of trust.

The rule that trusts are not within the Statute of Limitations, applies only between trustees and *cestui qui trust*, not between trustees or *cestui qui trusts* and third persons; and, therefore, it has been held, that where an *executor*, or *administrator*, or trustee for an infant, neglects to sue within the time provided by the Statute, the Statute of Limitations will bind the infant, and prevent his suing the debtor (*k*), although it would not prevent the infant from suing his trustee for a breach of trust; and so it has been determined, that the Statute of Limitations will bar a Bill for an account of rent of land held of trustees (*l*). The rule also will not hold, where the claim is made against a trustee by implication, more especially where such implication is raised upon a doubtful point (*m*). The rule, in fact, can only be taken to apply to those cases, where the possession of the trustee cannot be considered as adverse to that of the *cestui qui trust;* if the possession of the trustee is adverse, the Statute may be pleaded:—thus it was held, that in the case of

(*h*) 1 R. & M. 347.

(*i*) Sed vide Lord Castleton v. Fanshaw, 1 Eq. Ca. Ab. 305; Prec. in Cha. 99. S. C.

(*k*) Wych v. E. I. Company, 3 P. Wm. 309.

(*l*) Hercy v. Ballard, 4 Bro. Cha. Ca. 468.

(*m*) Townshend v. Townshend, 1 Cox. 28; 1 Bro. C. C. 550. S. C.

Pleas in Bar.

parceners and joint-tenants, they are accountable to each other without regard to the length of time, because the possession of one being the possession of all, there is a mutual possession between them; but it is otherwise in the case of tenants in common, where the possession of one may be adverse to that of the other (*n*).

This distinction is clearly pointed out by Lord Redesdale, in *Hovenden* v. *Lord Annesley* (*o*), who lays it down as a rule, that if the trust be constituted by act of the parties, the possession of the trustee is the possession of the *cestui qui trust*, and no length of such possession will bar; but, if a party is to be constituted a trustee by the decree of a Court of Equity, founded on fraud or the like, his possession *is adverse*, and the Statute of Limitations will run from the time that the circumstances of the fraud were discovered.

In cases of fraud.

This brings us to the question, how far the circumstance of a transaction being fraudulent will take a case out of the operation of the Statute of 21 Jac. 1, c.16. Upon this point it may be observed, that, although the proposition, that it is a rule in equity that no length of time will bar a fraud, is perfectly well founded, yet a Court of Equity will not impeach a transaction, on the ground of fraud, where the fact of its having been committed has been within the knowledge of the party for many years; if, therefore, the Bill states circumstances of fraud, and that the plaintiff did not become apprized of them till after the period limited by the Statute, as that within which proceedings ought to have commenced, had expired, a plea of the Statute of Limitations will not prevail, unless the defendant meets such statement by an averment and answer, negativing the fraud, or the fact of the discovery within the time specified in the Bill (*p*). The same rules which are applied by Courts of Equity to cases of fraud, will also be applied to cases of mistake; and it has been held, where there has been a mistake, that the Statute will not operate till after the expiration

Not if fraud discovered many years before.

Rule in cases of mistake.

(*n*) Prince v. Heylin, 1 Atk. 493.

(*o*) 2 Sch. & Lef. 633.

(*p*) Hovenden v. Lord Annesley, ubi supra; Blennerhassett v. Day, 2 Ball & B. 118; Whalley v. Whalley, 3 Bligh, 12.

Pleas in Bar.

of six years from the discovery of it (r). The principle upon which this rule is founded is, that the Statute runs from every new right of action or suit which accrues to the plaintiff, and that the discovery of the fraud gives to such plaintiff a new right; but, if he does not proceed within the time limited by the Statute from such discovery, he will be barred (s). This rule, which appears to have been the one relied upon by the Courts under the old Statute of Limitations, 21 Jac. 1, c. 16, has been distinctly embodied into the Act of 2 & 3 W. 4, c. 27, s. 16.

What acknowledgment or promises will take the case out of the Statute.

Acting upon the principle above laid down, that the period when every new right of action or suit accrues to the party, should be the period from which to date the operation of the Statute, the Courts have held, that where any new promise or any acknowledgment has been given by the defendant, it confers a new right of action upon the plaintiff; and that, therefore, the time within which the plaintiff's remedy would be barred must be reckoned from the time of such acknowledgment or promise being given.

Upon this principle the Courts have held, that payment of any part of the principal or interest within the period limited is a different acknowledgment to take the case out of the Statute (u). So they have held the rendering an account, or an offer to account, to be sufficient to prevent the bar (x).

Where the demand arises upon simple contract, acknowledgment must be in writing.

Till a very recent period, the Courts acted with very considerable laxity in their decisions upon the nature of the acknowledgment which, in the case of demands arising upon simple contracts, would be sufficient to take them out of the Statute of Limitations, which laxity gave rise to various questions as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking the case out of the operation of the statute; but, by a recent Act of Parliament, introduced by Lord Tenterden, these questions have, in a great measure, been set at rest. By that Act, (9 Geo. 4, c. 14, s. 1,) it has

(r) Brooksbank v. Smith, 2 Young & Collier, 58.

(s) Hovenden v. Lord Annesley, 2 Sch. & Lef. 637; South Sea Company v. Wymondsell, 3 P. Wms. 143.

(u) Hony v. Hony, 1 S. & S. 568.

(x) Earl Pomfret v. Lord Windsor, 2 Ves. 485.

Pleas in Bar.

been declared, that, in actions of debt or upon the case, grounded on any simple contract, no acknowledgment or promise by words shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the Statute, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby (*y*).

The above Act does not, however, alter or take away or lessen the effect of any payment of any principal or interest made by any person whatever; so that the payment of any interest or any part of the principal, within the period limited by the act, will still have the effect of taking the case out of the Statute.

It is to be observed, that the operation of the above Act is confined to cases of demands arising upon simple contracts, in which cases only it was, before the passing of the Act, held, that parol promises or undertakings would destroy the operation of the Statute of the 21 Jac. 1. c. 16, where the cause of action was a *tort*, subsequent acknowledgments were held nugatory (*z*). And in actions arising upon specialty, the statute did not apply.

Persons under legal disabilities may sue under 21 Jac. 1. c. 16, after their disabilities have ceased.

The statute 21 Jac. 1. c. 16, s. 2, provides that if any person entitled to the writs therein named, or who shall have a right of entry, shall be under the age of twenty-one years, feme covert, non compos mentis, imprisoned, or beyond sea, such person or his heirs may, notwithstanding the twenty years, by the preceding act limited as the period within which such writs might be sued out or entries made, bring his action or make his entry, as he might have done before the act, so that such action or entry was brought or made within ten years after his disqualification ceased.

(*y*) It is also declared, by the same section, that where there shall be two or more joint contractors or executors or administrators of any contractor, no such joint contractors, executor, or administrator, shall lose the benefit of the enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made or signed by any other or others of them.

(*z*) Arguendo, Hony v. Hony, 1 S. & S. 568, 578.

Pleas in Bar.

And by the seventh section, it is provided, that persons under any of the above disqualifications may bring the several actions enumerated in the third section, so that the same be brought within the time before limited for bringing the same after the termination of the disqualification.

It is to be remarked, that although the above mentioned sect. in the 21 Jac. 1. c. 16, provided for the statute not attaching where the plaintiff was under any of the disabilities therein mentioned, no provision was made to prevent its operating as a bar, during the time the defendant might be out of the jurisdiction; the 4 Ann. c. 16, s. 19, has, however, remedied that defect, and the creditor has under it the same privilege, where the debtor is beyond sea, as he had by the Statute of James, where he was beyond sea himself (a).

Statute of Limitations, cannot be pleaded where executor has not proved.

It is right to notice here, that it has been considered, that the 21 Jac. 1. c. 16, will not be a good plea to a suit against an executor or administrator, where he has not proved the will, because no *laches* can be imputed to a plaintiff for not suing while there is no executor or administrator against whom he can bring his action (b), but where the allegation of the Bill, upon a fair construction, was, that the defendant had possessed the personal estate, and therefore might have been sued as executor *de son tort*, a plea of the Statute of Limitations, by an executor who had not taken out probate till some years after the testator's death, was allowed (c). And it may be laid down as a general rule, that, wherever a party takes by assignment from another, the assignee will not be in a better position than the assignor, and, therefore, where the Statute of Limitations might have been pleaded against the assignor, it may be equally so against the assignee, whether such assignment be by act between the parties, or by act of law (d).

Secus where he is executor *de son tort*.

(a) Sturt v. Mellish, 2 Atk. 612.

(b) Jolliffe v. Pitt, 2 Vern. 694, 1 Eq. Ca. Ab. 305, (n); vide etiam the Lord Chancellor's observation in Webster v. Webster, 10 Ves. 93.

(c) Webster v. Webster, ubi supra.

(d) South Sea Company v. Wymondsell, 3 P. Wms. 143.

Pleas in Bar.

Statute of Limitations, 3 & 4 W. 4. c. 27.

It is to be remarked, that previously to the passing of the Statute 3 & 4 W. 4. c. 27 (*e*), neither the 21 Jac. 1. c. 16, nor any of the other statutes for the limitation of actions, applied specifically to Courts of Equity, though those Courts have in all cases, where legal titles and demands were the subject of litigation, held themselves bound by them, and in respect of equitable titles and demands have been influenced in their determination by analogy to it (*f*). The first mentioned Statute, specifically mentions suits in Equity amongst the actions and suits to be limited by its operation: it does not, however, apply to any suits but those relating to real property and monies charged upon land, &c. (*g*), *and legacies*, so that the Statute 21 Jac. 1. c. 16, may still be insisted upon by way of plea in all cases not included in the 3 & 4 Wm. 4. c. 27 in which it might before have been pleaded,

Cases included in its operation.

It may be useful in this place to point out the cases in which the Statute of Limitation of the 3 & 4 Wm. 4. c. 27, above referred to, operates as a bar to suits in Equity; and by the 24th section, all suits in Equity are barred by persons claiming any land or rent (within the meaning of the definitions contained in the 1st section of the Act,) unless within the period during which, by virtue of the provisions therein before contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right, as he claims in Equity. This right, however, in the case of an express trust, is declared, by the 25th section, not to have accrued against a purchaser, or those claiming under him, until the actual conveyance to such purchaser. It is also declared, that it is only against such purchaser, and any one claiming under him that the right shall then be deemed to have accrued; so that as between the trustee and the *cestui qui trust*, the law remains the same, as it did before the Statute.

Within what time, a suit concerning lands may be commenced.

In cases of express trust.

—against a purchaser.

—against a trustee.

In cases of concealed fraud.

It is also declared, by the 26th section, that, in every case of concealed fraud, the right to bring a suit in equity shall be deemed to have accrued at, and not before, the time at which

(*e*) Amended by 7 W 4. and 1 Vict. 28.

(*f*) Vide ante, p. 43, note.

(*g*) Vide, sect. 40.

Pleas in Bar.

such fraud has (or with reasonable diligence might have) been found out; it also provides that nothing in that section shall enable the owner of any lands, &c. to have a suit in equity for the recovery of such lands, &c. or for setting aside any conveyance of such lands, &c. on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time when he made the purchase, did not know and had no reason to believe, that any such fraud had been committed; and the 27th section saves the jurisdiction of Courts of Equity on the ground of acquiescence.

where there is a purchaser for valuable consideration.

in cases of acquiesence.

Operation of the Statute in cases of mortgage.

It has been before stated, that, previously to the passing of the Act now under consideration, a plea of the Statute of Limitations, 21 Jac. 1. c. 16, was held to be a good bar to a Bill for the redemption of a mortgage, if the mortgagee had been in possession of the mortgaged premises upwards of twenty years (*i*); and, indeed, as we have already seen, demurrers upon that ground have been allowed (*k*). The Courts, however, permitted the redemption of mortgages, if, at any time within the period of twenty years, the mortgagees had acknowleged that the estate was redeemable property. For this purpose, a positive acknowledgment of the mortgage was not required; but any act, on the part of the mortgagee, or of any one claiming under him, tending to shew that he considered the mortgage as still subsisting, (such as the keeping of accounts, &c.) was considered as sufficient to keep alive the interest of the mortgagor (*l*); nor was it necessary that the acknowledgment should have been made to the mortgagor, or to one claiming under him; any act by which the existence of the mortgage was admitted, even in transactions with a third party, was held sufficient (*m*); and so has a recital in a will, or any other deliberate instrument (*n*); and even a parol ac-

No redemption after twenty years' possession.

What acknowledgment will take the case out of the Statute.

(*i*) Lord Red. 220. Coop. Eq. Pl. 254; Beames on Pleas, 162.

(*k*) Ante, p. 43.

(*l*) Edsell v. Buchannan, 4 Bro. C. C. 254, 256; 2 Ves. J. 84. S. C.

(*m*) Hardy v. Reeves, 4 Ves. 466; Smart v. Hunt, cited ib. 478.

(*n*) Ord v. Smith, 2 Eq. Ca. Ab. 600; Perry v. Marston, 2 Bro. C. C. 399; Hansard v. Hardy, 18 Ves. 455; Price v. Copner, 1 S. & S. 347.

Pleas in Bar.

knowledgment, provided it was clear and unimpeachable, and made within twenty years, has been permitted to take the case out of the bar created by the Statute(o). The Statute 3 & 4 Wm. 4. c. 27, s. 28, has, however, made a considerable alteration in the law, in this respect, by enacting, that where a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given *to the mortgagor, or some person claiming his estate*, or to the agent of such mortgagor or person *in writing, signed by the mortgagee or person claiming through him*, and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, (if more than one,) was given. So that, according to that section, no acknowledgment will take a suit for the redemption of a mortgage out of the operation of the act, unless it be in writing signed by the mortgagee, or the person claiming through him, and given to the mortgagor himself, or to the person claiming the estate, or the agent of such mortgagor or person.

Where more than one mortgagor.

The same section then proceeds to enact, that when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, the acknowledgment, if given to any of such mortgagors or persons, or their agent, shall be as effectual as if the same had been given to all of them; but where there shall be more than one mortgagee, or more than one person claiming the estate and interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing the same, and the person or persons claiming any part of the mortgage

Where more than one mortgagee.

(o) Raynor v. Oastler, 6 Mad. 274; Whiting v. White, 2 Cox. 295; Perry v. Marston, ubi supra.

money, or land, or rent, by, from, or under him or them, *and any person or persons entitled to any estate, or interest, or interests, to take effect after or in defeazance of his or their estate or estates, interest or interests* (*p*), and shall not operate to give to mortgagor or mortgagors, a right to redeem the mortgage, as against the person or persons entitled to any other undivided or divided part of the money, land, or rent.

Pleas in Bar.

Where mortgagee giving the acknowledgment has only a share.

It is also provided, that where such of the mortgagees or persons as shall have given an acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

No suit to recover money charged on land after 20 years.

The above act not only limits the right of the mortgagor to redeem, but it provides against the mortgagee, or other person entitled to any money secured by mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or to any legacy, bringing any action or suit to receive such money, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent, in which case no action or suit can be brought but within twenty years after such payment or acknowledgment,

— after last payment or acknowledgment.

(*p*) It is to be observed, that the above clause renders the acknowledgment valid after twenty years, not only against the person signing the same, and those claiming under, or in privity with him, but against all others, whether claiming by descent or purchase in remainder or reversion. It is also to be observed, that there is no saving clause in the Act, in favour of persons under disabilities, such as infancy, coverture, &c.

Pleas in Bar.

or the last of such payments or acknowledgments, if more than one was given (*q*).

Legacies not recoverable after 20 years.

It is to be observed that, in the above section, *legacies* are mentioned amongst the items, the recovery of which is to be barred by the statute if the suit be not brought within twenty years. Before the passing of this act it had been repeatedly held. that the Statute of Limitations could not be pleaded to suits for the recovery of legacies, although the Court, after the lapse of a great time, would, under certain circumstances, presume payment (*r*). Section 42 of the above Act has provided, that no interest in respect of any *legacy* should be recovered but within six years next after the same should have become due, or next after an acknowledgment of the same should have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent.

Arrears of dower.

The Act also provides, (section 41,) that no arrears of dower, or any damages on account of such arrears, shall be recovered or obtained by any action or suit, for a longer period than six years before the commencement of such action or suit. And by section 42, it is enacted, that no arrears of rent, or of interest in respect of any sum of money, charged upon or payable out of any land or rent, or in respeot of any legacy (*s*), or damage in respect of such arrears of rent or interest shall be recovered by any distress, action, or suit, but within six years after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, by the person by whom the same was payable or his agent. It is,

— rent or interest not recoverable after six years.

—Unless an acknowledgment in writing shall have been given,

(*q*) Section 40. It seems that, under the above act, some doubt had arisen whether the mortgagor could make an entry, or bring an action at law, to recover possession of the property, after twenty years had elapsed from the mortgage becoming absolute, although principal and interest might have been paid in the meantime. In consequence of this doubt, the 7 Wm. 4. & 1 Vict. c. 28, was passed, by which it was declared, that mortgagees might bring actions or suits in equity, to recover the land, &c. at any time within twenty years, after the last payment of any part of the principal or interest secured by the mortgage.

(*r*) Anon. 2 Freem. 22 Pl. 20 Parker v. Ash. 1 Vern. 256; Fotherby v. Hartridge, 2 Vern. 21 Wood v. Briant, 2 Atk. 521 Jones v. Turberville, 2 Ves. Jun. 11 4 Bro. C. C. 115; S. C. cited 2 Ves. Jun. 280; Higgins v. Crawfurd, ib. 571.

(*s*) Supra.

however provided, that where any prior mortgagor, or other incumbrancer, shall have been in possession of any land, or in receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person intitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the term of six years.

Pleas in Bar. — or unless prior mortgagee has been in possession within one year before suit commenced.

Care must be taken in framing a plea of a Statute of Limitations to set up the proper Statute. Thus in all cases, where the suit relates to a debt or money due upon simple contract, or an account, the Statute of 21 Jac. 1. c. 16, should be pleaded, where the subject matter of the suit is land or rent, or the redemption of a mortgage, or where it relates to the recovery of the principal money secured on mortgage, judgment, or lien, or otherwise charged or payable out of land or rent, at law or in equity, or to the payment of a legacy, the 3 & 4 W. 4. c. 27, must be pleaded, which must also be the Statute pleaded where the suit is for the recovery of the arrears of dower, or for the arrears of rent, or interest accrued in respect of any charges upon land or rent, or in respect of any legacy. The Statute, 3 & 4 W. 4, c. 27, also contains provisions for the limitation of demands by ecclesiastical or eleemosynary corporations sole (*t*), and of suits for enforcing the right of presentation to any church, vicarage, or other ecclesiastical benefice (*u*); in all these cases the act must be pleaded.

Form of Plea.

A plea of a Statute of Limitations must contain sufficient affirmative averments to bring the case within the Statute pleaded. Thus a plea of the Statute 21 Jac. 1. c. 16, to a Bill for a debt, must aver, besides reciting the Statute, that the debt accrued more than six years before the filing of the Bill, and so where a demand is of any thing executory, as a note for the payment of an annuity, or for money at a distant

Positive averments.

(*t*) Sect. 29. (*u*) Sects. 30, 31, 32, 33.

Pleas in Bar.

period, or by instalments, the defendant must aver, that the cause of action hath not accrued within six years, because the Statute bars only what was actually done six years before the action brought (*x*). It does not appear, however, that a particular form of words is necessary in such averments, provided those made use of are sufficient to bring the case within the Statute; therefore, where the plea, instead of averring that the money in question was not received within the last six years, averred, that no cause of action accrued within that time, it was held sufficient (*y*).

Negative averments.

Whenever, also, any matters are stated in the Bill, which are calculated to take the case out of the Statute, these must be met by negative averments, as well as by answer in support of the plea (*z*). Thus if the Bill charges fraud, the plea must deny the fraud (*a*), or aver that the fraud, if any, was discovered above six years before the filing of the Bill (*b*). So if the Bill alleges, that the defendant discovered the fraud, more than six years before the Bill was filed, the plea must aver that he did not make such discovery within that time (*c*).

Pleas of other Statutes of Limitations.

It is to be observed here, that the Statutes above specified, are not the only ones which may be set up as Statutes of Limitation, there are others which may in like manner be offered to the Court in the shape of a plea. In fact, any Statute, which operates as a limit to the time within which proceedings may be commenced at law for the recovery or assertion of a particular right or claim, may be set up in equity, as a bar, in all cases where it would have so operated at law, had the litigation been in a Court of Law, thus it has been held, that where a mortgagee of an advowson appears and presents to the Church, which he is not entitled to do before foreclosure, the Bill seeking to compel a resignation must be brought within six months after the death of the late incumbent, being

(*x*) Lord Red. 220.
(*y*) Sutton v. Earl of Scarborough, 9 Ves. 71.
(*z*) Ante, p. 111.
(*a*) Bicknell v. Gough, 3 Atk. 558.
(*b*) South Sea Company v. Wymondsell, 3 P. Wms. 143.
(*c*) Ibid.; Ld. R. 218, Sutton v. Lord Scarborough, ubi supra.

the period within which, by the Statute of Westminster 2 (*d*), a *quare impedit* must be brought (*e*)

Pleas in Bar.

Amongst the new modern Statutes, which may in like manner be set up as presenting a limitation of this nature, may be mentioned the Statute 2 & 3 Wm. 4, c. 71, for shortening the time of prescription in certain cases, and the 3 & 4 Wm. 4. c. 42, 'for the further amendment of the Law, and the better advancement of Justice,' section 3.

Plea of the Statute of Frauds.

— in what cases good.

The Statute 'for the prevention of frauds and perjuries (*f*)' may be pleaded in bar to a suit to which the provisions of that act apply (*g*). Thus to a Bill for a discovery and execution of a trust,' the Statute, with an averment that there was no declaration of the trust in writing, may be pleaded (*h*), though, in the case cited, the plea was overruled by an answer admitting in effect the trust. To a Bill for the specific performance of an agreement, the same statute, with an averment that there was no agreement in writing signed by the parties, has also been offered to the Court by plea (*i*). The Statute of Frauds may also be pleaded to a Bill to enforce a parol variation of a written contract (*k*), unless the variation is such as amounts to a mere waiver of a term in the agreement, such as the time for the commencement of a lease, &c. (*l*).

Averments.

A plea of this sort must contain an averment, that there was no declaration of trust or agreement in writing, duly signed &c. (*m*); and where there are any Equitable facts alledged, which may have the effect of taking the case out of the operation of the Statute, they must be met by negative averments in the plea (*n*), and must also be denied, by answer in support of the plea (*o*). This proposition appears to the writer, to be strictly in conformity with the principles

(*d*) 13 Edw. 3. c. 5.

(*e*) Gardiner v. Griffith, 2 P. Wms. 405; 3 Atk. 559. S. C.

(*f*) 29 Car. 2. c. 3.

(*g*) Lord Red. 215.

(*h*) Ibid.; Cottington v. Fletcher, 2 Atk. 156.

(*i*) Lord Red. 215; Mussell v. Cooke Prec. in Ch. 533; Child v. Godolphin, 1 Dick. 39; 3 Swanst. 423 (n), S. C.; Hawkins v. Holmes, 1 P. Wms. 770; Clerk v. Wright, 1 Atk. 12.

(*k*) Jordan v. Sawkins, 1 Ves. Jun. 402.

(*l*) Ibid.

(*m*) Lord Red. 215.

(*n*) As to negative averments, vide ante, 111.

(*o*) Lord Red. 2nd ed. 212, 214; Coop. Eq. Pl. 256; vide Beames on Pleas, 172.

Pleas in Bar. before laid down (*p*), as well as with the existing authorities; he thinks it right, however, to state that, in the third edition of Lord Redesdale's treatise, his Lordship mentions it as a position which was formerly considered to be well founded, but which the decision of the Court, in one case, had rendered it impossible now to sustain. The case to which he alludes is *Whitbread* v. *Brockhurst*(*q*), the determination in which the noble and learned author appears to have considered as rendering it impossible, where such matter was charged in the Bill, to plead the Statute in bar; the Court having thereby determined, that the denial of the matter so charged made the plea double, and, therefore, informal(*r*). The writer, however, cannot forbear to express his opinion, that, in the view Lord Redesdale has taken of the result of that decision, he has extended it much beyond the limits to which it is strictly applicable. It is to be noticed, that the object of the Bill, in *Whitbread* v. *Brockhurst*, appears to have been to enforce the performance of a contract, which is stated in the Bill to have been put into writing, by an agent of the defendant, so that the case which the defendant had to meet was that of a written agreement, and not the case of a parol agreement, with part performance averred to take it out of the effect of the statute. Part performance was certainly charged in the Bill, but the circumstance of the agreement being partly performed could be of no consequence towards establishing an agreement in writing; and to that case only was the plaintiff confined by the manner in which he had framed his Bill. If, after setting up a *written* agreement, the case had gone on to a hearing, and the plaintiff had failed to prove that there was any agreement in writing, but had succeeded in proving a parol agreement, he could not have obtained a decree, even though the Statute had not been insisted upon; for the Court will never allow a defendant to be taken by surprize, and permit a plaintiff setting up one case by his Bill, to take a decree upon evidence establishing another. If the plaintiff had framed his Bill in the alternative, for the purpose

(*p*) Ante, p. 111.
(*q*) 1 Bro. C. C. 404; 2 Ves. & B. 153 n. S. C.
(*r*) Lord Red. 317.

of avoiding the effect of the statute, and had charged that if the agreement was not in writing, there had been a part performance, the case would have been different, and the question of part performance would have become material; though, even in that case, he could not have pleaded such a plea without leave of the Court. But he did not do so, he relied upon a *written* agreement; the only defence, therefore, which was necessary to bring the case within the Statute of Frauds, was to plead the Statute, and aver that the agreement stated in the Bill was uot in writing and signed in the manner required by the Statute; this would have put the case, made by the Bill, distinctly in issue; but, instead of confining himself to such a defence, the defendant anticipated another case, not made by the Bill, namely, a parol agreement, partly performed, and tendered another issue upon the question of part performance, and, by so doing, clearly made the plea what is termed a *double plea*, which, as we have seen before, can never be resorted to without the leave of the Court (*s*), All, therefore, that is established by *Whitbread* v. *Brockhurst*, appears to the writer to be, that where an agreement in writing is set up by the Bill, a plea of the Statute of Limitations, with averments that the agreement was not in writing, and also that there was no part performance, will be bad, because it is a double plea. It is to be observed, that where the Bill sets up an agreement in writing, and alleging that it was destroyed, introduces certain acts of part performance, by way of evidence to prove the existence of a written agreement, a plea of the Statute of Frauds must be accompanied by averments negativing the facts alleged by way of evidence, and a plea in that form has been allowed (*t*). The case will be the same if the agreement is not alleged in the Bill to be in writing, and part performance is charged; there the case made is not of an agreement taken out of the Statute by the circumstance of its being in writing, &c., but of an agreement taken out of the Statute by the circumstance of there having been a part performance; in such case a plea of the Statute averring that

(*s*) Ante, p. 105.

(*t*) Evans v. Harris, 2 Ves. & B. 361; Jones v. Davis, 16 Ves. 262.

Pleas in Bar.

there was no written agreement, and that there was no part performance, would not be double, because it merely goes to answer one case, viz, the case made by the Bill, of an agreement taken out of the operation of the statute, by the circumstance of there having been a part performance (*u*).

It is proper to notice, that *Whitchurch* v. *Bevis*, above referred to, may at first sight seem to afford an authority against the rule, that a plea of the Statute of Frauds must be supported by averments negativing the facts introduced, to take the case out of the operation of the Statute; upon examination, however, it will be found, that this is not the case. The Bill prayed the specific performance of an agreement which was not reduced into writing, and alleged certain acts to shew a part performance; the defendant pleaded the Statute of Frauds, averring that there was no contract in writing, &c., but although the plea was accompanied by an answer as to the facts charged, to shew part performance there was no averment in the plea to negative them. The plea was at first overruled, but upon re-argument the Court allowed it; but although this decision appears, in some degree, to militate against the rule, that facts inconsistent with the plea must be met by averments, it will be found, from the Report, not to do so; the question, in fact, was not raised in the argument; the only point in discussion having been, whether the Statute of Frauds could be pleaded, without the plea being supported by an answer denying that there was a parol agreement; the facts charged by the Bill, as a part performance, were put out of the case, the Court considering them as weak and trivial, and by no means amounting to a part performance. Neither *Whitchurch* v. *Bevis*, nor *Whitbread* v. *Brockhurst* (*x*), therefore can, it is submitted, be cited as affording any conclusive authority in contradiction to the rule above laid down; in addition to which it must be remarked, that the rule has since been recognized by Lord Eldon, in *Morison* v. *Turnour* (*y*), as well as by Lord Loughborough in *Bayley* v. *Adams* (*z*): indeed, in a subsequent part of his treatise, Lord Redesdale himself

(*u*) Whitchurch v. Bevis, 2 Bro. C. C. 559.

(*x*) Ubi supra.

(*y*) 18 Ves. 175, 182.

(*z*) 6 Ves. 586.

Pleas in Bar.

appears to sanction the rule which he had in former editions laid down (*a*), It cannot, however, be denied, that the point is one of considerable difficulty, and as it is now placed beyond all doubt, that the benefit of the Statute may be had, if insisted on by answer, although a *parol* agreement be admitted (*b*), there can be little use in pleading it in bar, at least to bills seeking the specific performance of a contract.

With respect to Bills relating to trusts, where there is no declaration of trust in writing, it seems that there is some doubt, whether the rule which has been applied to parol agreements, viz. that, although the defendant confesses them by his answer, yet if he insists on the protection of the Statute, no decree can be made merely on the ground of that confession, will be extended to the confession of a trust by answer (*c*). In such cases, therefore, the safest course will be to meet the case made by the Bill by a plea of the Statute (*d*), negativing any matter charged by the Bill, which may avoid the bar generally by way of averment in the plea, and particularly and precisely by way of answer in support of the plea.

It should be subjoined that, if a defendant, in an answer, admits the agreement and do not claim the benefit of the Statute, he will be considered to have waived it; and that he cannot, afterwards, be allowed to insist upon it, although he does so by answer to an amended Bill (*e*).

The Statute of Frauds cannot be pleaded to enable a party to commit a fraud.

Before quitting the subject of the Statute of Fraud, it may be as well to call the readers' attention to the fact, that the Court will not allow a party to avail himself of the Statute of Frauds, for the purpose of committing a fraud; and, therefore, where a mere mortgage was contemplated, and an absolute conveyance was made by one, with the intention of a defeazance being executed by another, which was never carried into effect, the Court will not allow a defendant to avail himself of

(*a*) Lord Red. 241.

(*b*) Lord Red. 217; Moore v. Edwards, 4 Ves. 23, Coote v. Jackson, 6 Ves. 17; Blagden v. Bradbear, 12 Ves. 466; Rowe v. Teed, 15 Ves. 375.

(*c*) Lord Red. 217.

(*d*) Ibid. 218; vide Beames on Pleas, 179 and seq.

(*e*) Beames on Pleas, 178 and notes.

Pleas in Bar.

the Statute of Frauds, to protect him in the enjoyment of the estate under the conveyance (*f*). And so where an heir-at-law filed a Bill against a devisor, alleging that the devise was upon a secret trust, for a charitable purpose, contrary to the Statute 9 Geo. 2, c. 36, a plea of the Statute of Frauds was overruled (*g*). And the Court will never permit a party to protect himself, by a plea of the Statute, from discovery, whether a devise was obtained or prevented by the undertaking of the devisee or heir, to do certain acts in favour of individuals (*h*).

Cannot be pleaded to cases of sales before Master.

It is to be observed here, that sales before a Master of the Court, under a decree or order, are not within the Statute of Frauds (*i*).

Pleas of other general Statutes.

The above Statutes, viz.—those for the limitation of actions and suits, and for the prevention of frauds and perjuries, have been the object of particular attention in the preceeding pages; because, they are those which have been most frequently the subject of discussion before the Court; but any other public Statute, which may be a bar to the demands of the plaintiff, may be taken advantage of by a plea containing the averments necessary to bring the case of the defendant within the Statute, and to avoid any equity which may be set up against the bar which the Statute creates (*k*). Thus, in *Hitchins* v. *Lander* (*l*), the Statute 32 Hen. 8, c. 9, against buying and selling pretended titles, was pleaded, and the plea allowed. And so where a Bill was filed against a bankrupt, in respect of a demand occurring before his bankruptcy, the 5 Geo. 2, c. 30, was pleaded, and the plea allowed (*m*).

Against buying or selling titles.

Against bankrupts.

Pleas of private and local Acts.

A private or local Statute may also be pleaded in the same manner. Thus, to a Bill impeaching a sale of land in the fens, by the conservators under the Statute for draining the fens, the defendant pleaded the Statute, and that the sale was made

(*f*) Dixon v. Parker, 2 Ves. 219, 224.

(*g*) Stickland v. Aldridge, 9 Ves. 517.

(*h*) Ibid. 519.

(*i*) Attorney-General v. Day, 1 Ves. 218; Blagden v. Bradbear, 12 Ves. 466.

(*k*) Lord Red. 221.

(*l*) Coop. 34, vide etiam Wall v. Stubbs. 2 V. & B. 354.

(*m*) De Tastet v. Sharp, 3 Mad. 57. As to pleas of the Statute of Bankruptcy, vide ante, vol. 1, p. 80.

Pleas in Bar.

within and according to those Statutes, and the plea was allowed (*n*). It is to be observed, that a plea of a private act of Parliament must state the act, or at least so much of it as relates to the matter insisted upon; and it seems that, although an act, which is in its nature *private* or *local*, contains a clause directing that it shall be recognized in Courts as a public act, such a clause will not dispense with the necessity of setting it out (*o*).

Pleas of Statutes must be upon oath.

A plea of a Statute must be put in upon oath, for although the Statute itself is matter of record, the averments necessary to bring the case within it, are matters *in pais*, which must be supported by the oath of the party (*p*).

Plea of matters of record.

2. We come now to the consideration of those pleas in bar, which consist of matters recorded, or as of record in the Court itself, or some other Court of Equity, or in some Court not a Court of Equity (*q*).

In the Court of Chancery.

A decree or order of the Court, by which the rights of the parties have been determined, or another Bill for the same matter dismissed, may be pleaded to a new Bill for the same matter; and this, even if the party bringing the new Bill were an infant at the time of the former decree; for a decree enrolled can only be altered upon a Bill of Review (*r*).

Decree or order of dismissal;

A decree or order dismissing a former Bill for the same matter can, however, only be pleaded in bar to a new Bill, if the dismission was upon hearing, and was not in terms directed to be without prejudice (*s*); for a dismissal is a bar only, where the Court has determined that the plaintiff has no title to the relief sought by his Bill. Therefore, an order dismissing a Bill, upon an election by the plaintiff to proceed at law (*t*) for want of prosecution (*u*), is not a bar to another Bill. It is not, however, necessary, in order to entitle a defendant to plead a former suit and decree of dismissal, that the decree should have been made upon discussion of the merits;

—— but not where merely for want of prosecution.

(*n*) Brown v. Hamond, 2 Ch. Ca. 249.

(*o*) Nabob of Arcot v. E. I. Company, 3 Bro. C. C. 292, 309; 1 Ves. J. 371. S. C.

(*p*) Wall v. Stubbs, 2 V. & B. 354.

(*q*) Lord Red. 193.

(*r*) Ibid.

(*s*) Lord Red. 194.

(*t*) Countess of Plymouth v. Bladon, 2 Vern. 32; ante, p. 146.

(*u*) Brandlyn v. Ord, 1 Atk. 571.

Pleas in Bar.

if the dismissal has been merely for want of evidence, the decree will be equally a bar to another suit (*x*). There appears to be some doubt whether, where the decree for dismissal is made merely in consequence of the plaintiffs making default at hearing, such a decree can be considered as a bar, though in Lord Eldon's opinion, it would be very difficult and rather mischievous, to treat such conduct merely as a nonsuit at law (*y*).

Decree must be conclusive of the rights of the plaintiff;

A decree cannot be pleaded in bar of a new Bill, unless it is for the same matter as the Bill to which it is pleaded; therefore, a decree in a former suit, for an account of tithes, could not have been pleaded to a Bill for the tithes of any subsequent year (*z*). It must also be conclusive of the rights of the plaintiffs in the Bill to which it is pleaded, or of those under whom they claim; therefore, a decree against a mortgagor and order of foreclosure enrolled, will not be deemed a bar to a Bill by intervening incumbrancers, to redeem, although the mortgagee had no notice of their incumbrances (*a*).

must be final, or made so by subsequent order.

The decree must also be in its nature final, or afterwards made so by order, or it will not be a bar (*b*). Therefore, a decree for an account of principal and interest due on a mortgage, and for a foreclosure in case of non-payment, cannot be pleaded to a Bill to redeem, unless there has been a final order of foreclosure (*c*); nor can a decree, which has been made upon default of the defendant in not appearing at the hearing, be pleaded without an order making the decree absolute; the terms of such a decree being always, that it shall be binding on the defendant, unless on being served with a writ of subpœna for the purpose, he shall shew cause to the contrary (*d*).

In cases of foreclosure;

or of decrees made on default at the hearing.

A plea of a decree founded on a particular deed, which it is

(*x*) Jones v. Nixon, 1 Younge, 359.

(*y*) Pickett v. Loggon, 14 Ves. 232.

(*z*) Minor Canons of St. Paul's v. Crickett, Wightw. 30.

(*a*) Morret v. Westerne, 2 Vern. 663; 1 Eq. Ca. Ab. 164, S. C. vide ante, vol. 1, p. 373. In the above case, in consideration of the defendant having been long in possession, the Court on overruling the plea and ordering the plaintiff to except, limited the order, by directing that the defendant should answer to charges of errors or omissions, but that the plaintiff should not unravel the account at large before the hearing.—Lord Red. 194.

(*b*) Lord Red. 194.

(*c*) Senhouse v. Earle, 2 Ves. 450.

(*d*) Lord Red. 193.

Pleas in Bar.

Decree cannot be pleaded to a Bill to set aside a deed for fraud since discovered.

the object of the second suit to set aside, on the ground of fraud discovered since the decree made, would not be good (*e*). If, however, a Bill is brought to impeach a decree, on the ground of fraud used in obtaining it, (which may be done without the previous leave of the Court,) the decree may be pleaded in bar of the suit, with proper averments, and an answer negativing the charges of fraud (*f*). It is presumed also, that, even in the case last put, of a Bill to impeach the deed upon which a decree has been founded, a plea of the decree, supported by similar averments and answers, would be good.

May be pleaded to a Bill to impeach a decree for fraud.

Decree must be signed and enrolled;

A decree must be signed and enrolled, or it cannot be taken advantage of by plea (*g*), though it may be insisted upon by way of answer (*h*). But, although a decree not signed and enrolled cannot be pleaded directly in bar of the suit, Lord Redesdale is of opinion that it may be pleaded to shew that the Bill has been exhibited contrary to the usual course of the Court, and ought not, therefore, to be proceeded upon (*i*); for, if the decree had appeared upon the face of the Bill, the defendant might have demurred (*k*); a decree not signed and enrolled being to be altered only upon rehearing, as a decree signed and enrolled can be altered only upon Bill of Review (*l*).

how pleaded when not signed and enrolled.

What such a plea must state.

As a plea of this kind proceeds upon the ground, that the same matter was in issue in the former suit, and as every plea that is set up as a bar must be *ad idem* (*m*), the plea should set forth so much of the former Bill and answer, as will suffice to shew that the same point was then in issue; and, therefore, where the defendant pleaded only that a Bill was brought for an account and a decree made, Lord Hardwicke considered the plea as defective (*n*).

Averments.

Where the Bill seeks to impeach the decree on the ground of

(*e*) Wing v. Wing, 2 Mod. 109. 2 Eq. Ca. Ab. 71. S. C.

(*f*) Lord Red. 195.

(*g*) Anon. 3 Atk. 809; Kinsey v. Kinsey, 2 Ves. 577.

(*h*) Kinsey v. Kinsey, ubi supra, Charles v. Rowley, 2 Bro. P. C. 485.

(*i*) Kinsey v. Kinsey, ubi supra, notis.

(*k*) Wortley v. Birkhead, 3 Atk. 809; 2 Ves. 571. S. C.; Granville v. Ramsden, Bunb. 56.

(*l*) Lord Red. 195.

(*m*) Per Lord Hardwicke, 2 Atk. 603.

(*n*) Child v. Gibson, 2 Atk. 603.

Pleas in Bar.

fraud, the alleged fraud must, as we have seen, be negatived by averments in the plea, supported by an answer fully denying them (*o*). But as the averments negativing the charges of fraud are used merely to put the fact of fraud, as alleged by the Bill, in issue by the plea, they may be expressed in the most general terms, provided such terms are sufficient to put the charges in the Bill fully in issue. The answer, however, as to the facts of fraud alleged in the Bill, must be so full as to leave no doubt on the mind of the Court, that upon that answer, if not controverted by evidence on the part of the plaintiff, the fact of fraud could not be established (*p*).

Answer in support of.

Proceedings upon.

Pleas of a former decree, as well as those of another suit depending, are generally referred to the Master to inquire into the fact (*q*); and if the Master report the fact true, the Bill stands instantly dismissed, unless the Court otherwise order (*r*). The plaintiff may, however, except to the Master's report, and thus bring on the matter to be argued before the Court (*s*). He may also, if he conceives the plea to be defective in point of form or otherwise, independently of the mere truth of the fact pleaded, set the plea down to be argued as in the case of pleas in general (*t*). It is to be observed, that the reference to inquire into the truth of the plea, must be obtained by the plaintiff (*u*); and that in *Morgan* v. *Morgan* (*x*), it was laid down by the Lord Chancellor as a rule, that where a defendant pleads a decree of dismission of a former cause for the same matters, in bar of the plaintiff's demand upon a new Bill, if the plaintiff does not apply to the Court that it may be referred to a Master to state, whether there is such a decree, but sets down the cause upon the new Bill for hearing, it is a waiver of his right of application for such reference, and the Court will hear it.

Reference must be obtained by plaintiff.

Decree or order of any other Court of Equity.

As the ground of the defence by plea of a decree signed and enrolled is, that the matter has been already decided, a

(*o*) Lord Red. 195.
(*p*) Lord Red. 199, vid. ante, 133.
(*q*) Ante. 149.
(*r*) Lord Red. 246.
(*s*) Ibid.
(*t*) Ibid. 247.
(*u*) 1 Newl. 68.
(*x*) 1 Atk. 54.

decree of any Court of Equity, in its nature final, or made so by subsequent order, may be pleaded in bar of a new suit (*y*).

Pleas in Bar.

A plea in bar of matters of record, or of matters in the nature of matters of record in some Court, not being a Court of Equity, may be 1st. a Fine; 2nd. a Recovery; 3rd. a Judgment at law, or sentence of some other Court.

Plea of matters of record not in a Court of Equity.

1. A Fine is a record of the Court in which it has been levied, and, if levied before the 31st of December, 1833 (*z*), is equally good as a bar in Equity as it is at common law, provided it be pleaded with proper averments (*a*).

Of a fine and non-claim;

It is to be observed, that a fine or non-claim does not operate by turning the estate into a right, but by force of the bar arising from the Statute of *non-claims;* therefore, if the title is a mere legal title, and a man has purchased an estate which he himself sees has a defect upon the face of the deeds, yet the fine will be a bar; for the defect on the face of the deeds is often the occasion of the fine being levied; and so it has been held, that even a fine levied upon a bare possession may be a bar in Equity, if a legal bar, though with notice, at the time the fine was levied (*b*).

A fine will bar though legal title be defective.

It is said, that a fine will also bar a trust, or any other right in Equity, because it is equally within the very words and meaning of the law which concludes all persons, as well privies as strangers, who do not make their claim as the Act directs; but with regard to equitable titles, there is a difference between where a man has a right in the land itself, and where his right in equity is only against the person in respect of the land (*c*). In the first case, a fine will bar, not in the latter (*d*).

Operation of a fine upon a trust.

Fine levied by a trustee will not bar.

(*y*) Lord Red. 200; Fitzgerald v. Fitzgerald, 5 Bro. P. C. 567; vide etiam, Jones v. Nixon, 1 Younge, 359.

(*z*) Vide Statute 3 & 4 W. 4, c. 74.

(*a*) Lord Red. 204. Thynne v. Cary, W. Jones, 416; Salisbury v. Baggot, 1 Ch. Ca. 278; 2 Swanst, 610; Watkins v. Stone, 2 S. & S. 560; Story v. Lord Windsor, 2 Atk. 630.

(*b*) Brereton v. Gamul, 2 Atk. 240.

(*c*) Salisbury v. Baggot, ubi supra, Thynne v. Cary, W. Jones, 416; Sed vide, Kennedy v. Daly, 1 Sch. & Lef. 379.

(*d*) Salisbury v. Baggot, 2 Swanst. 611.

Pleas in Bar.

Thus if a trustee levies a fine of the lands whereof he is seized in trust, to a person who has notice of the trust, or if a man purchases from a trustee with notice, and levies a fine, the *cestui qui trust* will not be barred, because the fine being levied to a person, or by a person who has notice of the trust, such person will stand in the place of the seller, and is as much a trustee as the seller was (*e*), and the Court of Chancery will not permit him to set up the fine as a bar to his liability to execute the trust. The consequence of this is, that whenever a person is charged as claiming under a trustee, he must either set up an opposite title, or deny his claiming under the trustee, or, if he does claim under the trustee, he must set forth that he paid a valuable consideration for the land(*f*).

Fine by a mortgagor, will not bar mortgagee.

Upon this principle, it is held that a mortgagor cannot bar a mortgagee by fine and non-claim; for although the mortgagee is in reality out of possession, yet as that is by the consent of both parties, and the nature of the contract requires that it should be so while the interest is paid, it would be against the original design of the contract, that any act of the mortgagor, except the payment of money, should deprive the mortgagee of his security (*g*).

Fine by mortgagee or grantee of mortgagee, will not bar mortgagor.

Upon the same principle, a fine and non-claim by a mortgagee in possession, will not bar the equity of redemption (*h*).

Fine by a stranger, will not bind an infant's *cestui qui trust*.

So if the grantee of a mortgagee levies a fine, that will not discharge the equity of redemption (*i*); and it is a principle of Equity, that if a stranger enters upon an infant's estate, and receives the profits, he shall be looked upon as a trustee for the infant, and that the *laches* of a trustee shall not prejudice the *cestui qui trust* (*k*); therefore, where there was a devise of lands to trustees until the testator's debts were paid, and then to an infant and his heirs, and the defendant entered upon the estate and levied a fine, and the non-claim passed, but the infant, after the five years had elapsed, filed a Bill in Chancery

(*e*) Story v. Lord Windsor, 2 Atk. 631; Kennedy v. Daly, 1 Sch. & Lef. 355.

(*f*) Gilb. For. Rom. 62—Coop. Eq. Pl. 261.

(*g*) Ibid.

(*h*) Ib. 262.

(*i*) Ib.; Lord Red. 205.

(*k*) Newburgh v. Bickerstaffe, 1 Vern. 295; Cary v. Bertie, 2 Vern. 342.

Pleas in Bar.

for possession and for an account, it was determined, that although the fine and non-claim were a good bar at law, the legal estate being in the trustees, who ought to have entered, yet the fine and non-claim should not run upon the trust in the infant's minority, nor he suffer by the laches of his trustees (*l*).

Fine levied pursuant to a decree will not operate further than decree directs.

Where a fine has been levied pursuant to a decree of the Court of Chancery, for a particular purpose, the Court will not permit it to operate further than the decree directs (*m*). The intention of marriage articles is also so far considered in equity, that if a fine be levied of the lands comprehended in such articles to different uses, a Court of Equity, notwithstanding such fine, will compel a conveyance of the lands to the uses of the marriage articles (*n*).

In what cases fine will be prevented by a suit in equity.

It is to be observed, that where a title to the land is merely equitable, as in the case of an agreement to settle lands to particular uses, a claim to avoid a fine must be by *subpœna* (*o*); the pendency of a suit in equity will, therefore, in equity prevent, in many cases, the running of a fine (*p*); and, upon the whole, it may be laid down as a rule, that wherever a person comes in by title opposite to the title to a trust estate (*q*), or comes in under the title to the trust estate for valuable consideration without fraud, or notice of fraud or of the trust, a fine and non-claim may be set up as a bar to the claim of a trust (*r*).

Plea of fine will not lie to a Bill to remove outstanding terms.

It is to be noticed that the plea of a fine and non-claim will not hold to a Bill to remove an outstanding term of years (*s*). In this respect there is a difference between the plea of a fine and

(*l*) Allen v. Sayer, 2 Vern. 368; sed. vide Wych v. E. I. Company, 3 P.Wms. 310, and Lord Red. 205, where it is suggested, that perhaps this should be understood a., applicable to the case of a fine, levied with notice of the title of the infant.

(*m*) Goodrick v. Brown, 1 Ch. Ca. 49; Baden v. Earl of Pembroke, 2 Vern. 56.

(*n*) Trevor v. Trevor, 1 P.Wms. 622; Cusack v. Cusack, 1 Bro. P. C. 470.

(*o*) Lord Red. 205; Salisbury v. Baggot, ubi supra.

(*p*) Lord Red. 205.

(*q*) Stoughton v. Onslow, 1 Freem. 111, cited 2 Swanst. 615.

(*r*) Lord Red. 206; For. Rom. 63.

(*s*) Leigh v. Leigh, 1 Sim. 349.

Pleas in Bar. one of the Statute of Limitations, which has been held good where pleaded to a similar Bill (*t*).

Averments.

In a plea in Equity of a fine and non-claim, the same strictness is required as at law; therefore, where a defendant, instead of averring positively that the party levying the fine was actually seized, averred that he was seized, or pretended to be seized, the plea was held to be bad (*u*); and so where the averment was, that, after the death of A., the defendant entered into possession, claiming to be seized in fee under his will, and was in the actual possession or receipt of the rents and profits, and being thereby seized the fine was levied, Lord Eldon held the plea to be informal (*x*).

Plea of a fine must aver a seizin.

But need not aver a seizin fee.

But, although it is necessary to aver a seizin, it is not necessary to aver a fee; an averment, that the party was seized *ut de libero tenemento*, and that being so seized the fine &c, was levied will be sufficient (*y*). It is to be observed, that in *Butler* v. *Every* (*z*), cited in *Dobson* v. *Leadbeater*, above referred to, there was no positive averment of seizure, but Lord Thurlow appeared to consider, that the plea did, nevertheless, contain a sufficient general averment. It seems, however, to be the better opinion, that such an averment is absolutely necessary. The plea in that case was of a fine of lands, &c., in the county of Derby and elsewhere, with an averment, that it was levied of all the lands, &c., which belonged to the conusor, and it was held good, although it did not contain any averment, that the party had no lands but in Derbyshire. In the same case also, advowsons were mentioned in the fine, and it was objected that the fine could not operate as a bar, because seizin by presentation was not averred, but the Court held that a general averment of seizin was sufficient, and that they would intend that there were advowsons, merely because they were mentioned in the fine.

Fines abolished by 3 & 4 W. 4. c. 74.

It is to be observed, that a plea of a fine and nonclaim, can

(*t*) Jermy v. Best, 1 Sim. 373.

(*u*) Story v. Lord Windsor, 2 Atk. 632; as to the form of pleading a seizin, vide ante, v. 1, 467.

(*x*) Dobson v. Leadbeater, 13 Ves. 232.

(*y*) 2 Vern. 190.

(*z*) 1 Ves. J. 136; 3 Bro. C. C. 80. S. C.

now only be made use of, where the fine has been levied before the 31st December, 1833, the 3 & 4 Wm. 4. c. 74, having abolished that species of assurance from that date, and substituted, in its stead, a more simple form, by deed enrolled in the High Court of Chancery, within six months from the date thereof (c).

Pleas in Bar.

It may be noticed that a plea of conveyance, fine, and non-claim is not multifarious, but a good plea, the whole being a plea of the same title (d). There is also in the books, an instance of a plea of a fine and a recovery, which was held good, probably on a similar principle (e).

Plea of conveyance, fine, and non-claim, not multifarious.

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2. A common recovery duly suffered, like a fine, is a record of the Court in which it has been suffered; and if it has been suffered previously to the 31st of December, 1833, such recovery may be pleaded in equity, as well as at law, if the estate, limited to the plaintiff, or under which he claims, is thereby barred (g). Since the Statute 3 & 4 Wm. 4. c. 74, common recoveries can be no longer suffered; but where an estate tail has been barred, by the execution of a deed executed and enrolled in the Court of Chancery, within the provisions of that Act, such deed and enrolment may be shewn to the Court, by plea, instead of a recovery.

Of a common recovery.

Recoveries abolished by 3 & 4 W. 4. c. 74.

The form of a plea of recovery appears to be nearly the same in equity as at law; in *Attorney-general* v. *Sutton* (h), the suffering of the recovery appears to have been averred in the following form 'that Thomas Sutton, the testator's nephew, being tenant in tail by the will, had suffered a common recovery, and thereby barred the charities.'

Form of Plea.

3. The judgment of a Court of ordinary jurisdiction, is also a matter of record, which may, in general, be pleaded in bar to a suit in Chancery, provided such judgment has finally de-

Of a judgment of a Court of ordinary jurisdiction.

(c) Sects. 40, 41.
(d) Doble v. Cridland, 2 Bro. C. C. 274.
(e) Ross v. Pudsey, Finch. Rep. 306.
(g) Lord Red. 206; Attorney-general v. Sutton, 1 P. Wms. 754.
(h) 1 P. Wms. 754; 3 Bro. P. C. 75.

Pleas in Bar. Of Courts of Common Law.

termined the rights of the parties (*i*). Thus a judgment of a Court of Common Pleas in a writ of right (*k*), or a verdict and judgment entered thereon in a Court of Common Law, have been held to be a good bar in a Court of Equity, for the same matter (*l*). So it seems that a plea of a nonsuit, in an action of trover, has been allowed as a good plea (*m*).

In *Behrens* v. *Pauli* (*n*), a plea, that a verdict and judgment in the Lord Mayor's Court had been obtained by the defendant against the plaintiff on the same matter in respect of which relief was sought by the Bill, was allowed by Lord Langdale, M. R., on the ground that the Lord Mayor's Court was a Court of competent jurisdiction to decide the case, and, although the decision of the Master of the Rolls was afterwards overruled by Lord Cottenham, in *Behrens* v. *Sieveking* (*o*), it was merely upon the ground of an informality in the plea, in not shewing that the subject matter of the suit, in the Lord Mayor's Court, was the same, and that the proceedings were taken for the same purpose.

It is not necessary that the Court, the judgment of which is pleaded, should be a Court of Common Law; the sentence of any Court may be a proper defence by way of plea. Thus, it seems that a sentence of a Court of Admiralty will, if properly pleaded, be a good plea (*p*). And so may a sentence of an Ecclesiastical Court (*q*); upon this ground it is that a will and probate, even in the common form, in the proper Ecclesiastical Court, which is in the nature of a sentence, is a good plea to a Bill by persons claiming as next of kin to a person supposed to have died intestate (*r*). If fraud in obtaining the will is charged, that is not a sufficient equitable ground to impeach a probate, for the parties may resort to the

Court of Admiralty.

Ecclesiastical Court.

Probate of will.

(*i*) Lord Red. 207.

(*k*) Sidney v. Perry, ib.

(*l*) Wilcox v. Sturt, 1 Vern. 78; Bluck v. Elliot, Finch. 13; Pitt v. Hill, ib. 70; Cornell v. Warren, ib. 235; Temple v. Lady Baltinglass, ib. 275; Williams v. Lee, 3 Atk. 223.

(*m*) Wilcox v. Sturt, ubi supra; vide etiam Cornell v. Warren, ubi supra.

(*n*) 1 Keen. 456.

(*o*) 2 M. & Craig, 602.

(*p*) Parkinson v. Lecras, cited Ld. Red. 209.

(*q*) Pengill v. Luscombe, 2 Jac. & W. 201.

(*r*) Jauncy v. Sealy, 1 Vern. 397; Lord Red. 209.

Pleas in Bar.

Ecclesiatical Court, which is competent to determine the question of fraud (s), unless indeed the case be one, in which the fraud has not gone to the whole will, but only to some particular clause, or in which it has been practised to obtain the consent of the next of kin to the probate, in which cases the Court has laid hold of these circumstances to declare the executor a trustee for the next of kin (t). Where there are no such circumstances in the case, the probate of the will is a clear bar to a demand of personal estate (tt); and where a testator died in a foreign country, and left no goods in any other country, probate of his will, according to the law of that country, was determined to be a sufficient defence against an administrator appointed in England (u); but such foreign probate will not do, if there are any goods in England, for in that case the will must be proved here. It is not, indeed, necessary in every case, that the Court whose sentence is pleaded, should be an English Court; the sentence of a foreign Court may be a proper defence by way of plea (x). But the Court pronouncing the sentence must at least have had full jurisdiction to determine the rights of the parties (y). Indeed the last requisite is necessary in all pleas of this nature: it is also necessary, that the sentence pleaded should be final, and not an interlocutory proceeding (z).

Sentence of a foreign Court.

Court must have full jurisdiction.

An interlocutory sentence cannot be pleaded.

Although a final judgment of a Court of competent jurisdicdiction, whether in this or any other country, will, as we have seen, operate as a bar to a claim for the same matter in a Court of Equity, yet if, from any circumstance, such as fraud, mistake, or surprise, it is against conscience that the defen-

(s) Lord Red. ib.; Archer v. Mosse, 2 Vern. 8; Nelson v. Oldfield, 2 Vern. 76; Attorney-general v. Ryder, 2 Cha. Ca. 178; Plume v. Beale, 1 P. Wms. 388; Stephenton v. Gardiner, 2 P. Wms. 287; Bennet v. Vade, 2 Atk. 324; Kerrick v. Bransby, 7 Bro. P. C. 437; Meadows v. Duchess of Kingston, Amb. 756; Griffiths v. Hamilton, 12 Ves. 298.

(t) Lord Red. 209; Barnesley v. Powel, 1 Ves. 284; Marriot v. Marriot, 1 Stran. 666; Meadows v. Duchess of Kingston, Amb. 762, 3.

(tt) Lord Red. 210.

(u) Jauncy v. Sealey, 1 Vern. 397.

(x) Lord Red. 208; Newland v. Horseman, 1 Vern. 21; 2 Ch. Ca. 74. S. C.; Burrows v. Jamereau, Sel. Ca. in Cha. 69, 1 Dick. 48, S. C.; Gage v. Bulkeley, 3 Atk. 215; White v. Hall, 12 Ves. 321.

(y) Gage v. Bulkeley, ubi supra.

(z) Samuda v. Furtado, 3 Bro. C. C. 70, 71.

Pleas in Bar.

dant should avail himself of such a bar, a Court of Equity will interfere to set it aside (*a*). Where, however, a Bill for that purpose is filed, the defendant may plead the judgment in bar, negativing by averments, and denying by answer, the equitable circumstances alleged in the Bill, upon which the judgment is sought to be impeached.

Where no equitable grounds of relief against it are alleged.

It is to be observed, that where a Bill itself states a sentence of another Court, without alleging any equitable matter to avoid it; a plea of that sentence will not hold, because it brings forward no new matter, and the defendant ought to have demurred (*c*), and upon this ground it appears to be the opinion of Lord Redesdale, that where a Bill was filed, by an executor, who had assented to a specific bequest, to set aside a verdict and judgment in trover, obtained by the specific legatee, on the ground that trover would not lie for a legacy and that the damages given by the jury were excessive, and the defendant pleaded the verdict and judgment in bar, the defence ought to have been by demurrer as there was no charge in the Bill, requiring averment in support of Bill (*d*), upon the same principle where the probate of a will is impeached on the ground of fraud used in obtaining it, the defence should be by demurrer, because as fraud is not a sufficient equitable ground to impeach the probate (*e*), the mere setting up of the probate, which appears upon the Bill, is not a sufficient averment of a new fact to support a plea.

Of matters in *pais.*

Pleas in bar of matter in *pais* only are, principally, 1. of a stated account; 2. of a release; 3. of an award; 4. of an agreement; 5. of a title, founded, either on adverse possession, or on a will, or conveyance, or other instrument affecting the right of the parties; 6. of a purchase for valuable consideration without notice of the plaintiff's title.

Of a stated account.

1. A plea of a stated account, is a good bar to a Bill for an

(*a*) As to the circumstances which will be sufficient to impeach a verdict and judgment in equity, vide Williams v. Lee, 3 Atk. 223; Lord Red. 208; Samuda v. Furtado, 3 Bro. C. C. 72. If no such equitable circumstances are alleged in the Bill, the defendant may demur. Lord. Red. 208.

(*c*) Williams v. Lee, 3 Atk. 223.

(*d*) Lord Red. 208.

(*e*) Supra, 184.

Pleas in Bar.

account (*f*), for there is no rule more strictly adhered to in this Court, than that when a defendant sets forth a stated account, he shall not be obliged to go upon a general one, because very often the opening of a stated account would unravel a perplexed affair which might otherwise remain in the dark (*g*).

Account must be final.

In order to support a plea of a stated account, it must be shewn to have been final (*h*); it is not sufficient to allege that there has been a dividend made between the parties, which implied a settlement; for a dividend may be made upon a supposition that the estate will amount to so much, but may be still subject to an account being stated afterwards. A man who pleads a stated account must shew it was in writing, and likewise the balance in writing, or at least set forth what the balance was (*i*). It does not, however, seem to be necessary to aver that the account was settled between the parties upon a minute investigation of items,—a general agreement or composition will be sufficient (*k*); nor will the circumstance of the account appearing to have been settled, *errors excepted,* be a sufficient ground to open a settled account, unless specific errors are pointed out in the Bill (*l*).

—Must be in writing.

Will not protect defendant from a discovery, where it is necessary to enable a plaintiff to resist claims by a third party.

It may be observed, that a stated account will not operate as a bar to a discovery, where the plaintiff is entitled to such discovery, not for the purpose of any proceeding between him and the defendant, but to enable him to protect himself from claims by other people; therefore, where a Bill sought from a trustee for sale a discovery of the estates sold, and of the amount of the debts, charges, &c. to be paid out of the produce and sums of money received from the sale, &c., and also of the vouchers relating to his receipts and payments; and the trustee pleaded a stated account between him and the *cestui qui trust,* under whom the plaintiff claimed, the plea was over-

(*f*) Lord Red. 210; Dawson v. Dawson, 1 Atk. 1.

(*g*) Sumner v. Thorpe, 2 Atk. 1; Coop. Eq. Pl. 277.

(*h*) Dawson v. Dawson, ubi supra.

(*i*) Burk v. Brown, 2 Atk. 399.

(*k*) Sewell v. Bridge, 1 Ves. 297.

(*l*) Ante, v. 1, 480; Taylor v. Haylin, 2 Bro. C. C. 310; 1 Cox, 475. S. C.; Johnson v. Curtis, 3 Bro. C. C. 266.

Pleas in Bar.

ruled by Lord Eldon, because the plaintiff had a right to the information required, for the purpose of enabling him to ascertain what estates had been sold, and to protect himself, by means of the vouchers, from being obliged to pay the debts over again. His Lordship, however, appeared to think, that if the fact was, that an account had been rendered satisfying all these inquiries, &c., and the plea had contained proper averments to that effect, it would have held (*m*).

General release, not under seal, may be pleaded as a stated account.

It may be remarked, in this place, that a general release of all demands, ***not under seal***, may be pleaded as a stated account (*n*).

Need not be signed.

It is not essential, in order to the validity of a stated account as a bar, that it should have been signed by the parties; it will be sufficient if an account has been delivered and acquiesced in for a considerable length of time: thus, where there have been mutual dealings between a merchant in England, and a merchant beyond sea, and an account is transmitted by one to the other, if the person to whom it is sent keeps it by him for any length of time without making any objection, it will bind him and prevent him opening the account afterwards (*o*).

But mere delivery of account will not be sufficient, unless acquiescence is shewn.

The mere delivery of an account, however, will not constitute a stated account, without some evidence of acquiescence which may afford sufficient legal presumption of a settlement (*p*). It has been said, that among merchants it is looked upon as an allowance of an account current, if the merchant who receives it does not object to it in a second or a third post (*q*).

Rule among merchants.

But in *Tickel* v. *Short* (*r*), Lord Hardwicke said, that if one merchant sends an account to another in a different country, on which a balance is made due to himself, and the other keeps it by him ***about two years*** without objection, the rule of this Court, as well as of merchants, is, that it is considered as a stated account (*s*).

Plea must aver that it is just and fair.

A defendant pleading a stated account, must, whether error

(*m*) Clarke v. Earl of Ormonde, Jacob, 116.

(*n*) For. Rom. 57.

(*o*) Willis v. Jernegan, 2 Atk. 252.

(*p*) Irvine v. Young, 1 S. & S. 333.

(*q*) Sherman v. Sherman, 2 Vern. 276.

(*r*) 2 Ves. 239.

(*s*) Tickel v. Short, 2 Ves. 239.

Pleas in Bar.

or fraud be charged or not, aver that the stated account is just and true to the best of his knowledge and belief (*t*); but it is not necessary that the account should be annexed by way of schedule, for the plea is sufficient, in case it be a fair account between the parties; but where a Bill impeaches the account, and alleges that the plaintiff has no counterpart of it, and prays that it may be set forth, the defendant must annex a copy of the account to his answer by way of schedule, so that if there are errors upon the face of it, the plaintiff may have an opportunity of pointing them out (*u*).

Account need not be annexed to plea. *Secus* where plaintiff avers that he has no counterpart of it.

The delivery up of vouchers is an affirmation that the account between the parties was a stated one; and where such a transaction has taken place, it should be averred in the plea (*x*).

Delivery up of vouchers.

It has been before stated, that the effect of pleading a stated account to a mere Bill for an account, is to compel the plaintiff to amend his Bill, and to charge either fraud or particular errors (*y*), it remains only to observe, that if specific errors or fraud are charged in the Bill for the purpose of impeaching the account, they must be denied by averments in the plea, as well as by answer in support of the plea (*z*).

Effect of a stated account.

It may be observed here, that when fraud is proved to have taken place in a settlement of account, it will be a sufficient ground to open the whole account (*a*); and this has been done by the Court, though the account had been settled for twenty-three years, and the party who was guilty of the fraud was dead (*b*).

Where fraud is proved.

Upon the same principle, where an account has been settled between an Attorney and his Client, and it appears upon the face of the account that the Attorney has not given that credit, and produced to his Client that state of his affairs, which he was entitled to have, the Court will not permit such an account to stand (*c*): the same rule will apply to cases of ac-

In accounts between attorney and client.

(*t*) Anon. 3 Atk. 70.

(*u*) Hankey v. Simpson, 3 Atk. 303.

(*x*) Lord Red. 211; Willis v. Jernegan, 2 Atk. 252.

(*y*) Ante, vol. 1, 481.

(*z*) Lord Red. 211; Phelps v. Sproule. 1 M. & K. 231.

(*a*) Vernon v. Vawdry, 2 Atk. 119.

(*b*) Ibid.

(*c*) Matthews v. Wallwyn, 4 Ves. 125.

Pleas in Bar.

Where errors and mistakes only are proved.

counts settled between principal and agent (*d*). The case, however, is different, where errors or mistakes only are shewn to exist in the account; for there the account will not be opened, but the party will be permitted merely to surcharge and falsify it (*e*). This is an important distinction, because, where an account is opened, the whole of it may be unravelled, and the parties will not be bound by deductions agreed upon between them on taking the former account (*f*); but where a party has liberty to surcharge and falsify, the *onus probandi* is always on the party having the liberty; for the Court takes it as a stated account and establishes it: but if the party can shew an omission for which there ought to be credit, it will be added, (which is a *surcharge,*) or if any wrong charge is inserted, it will be deducted, (which is a *falsification.*) This however, must be done by proof on his side (*g*).

Of surcharging and falsifying.

It is to be noticed here, that although a party seeking to open a settled account, must specify the errors he insists upon (*h*), it is not necessary that he should, at the hearing, prove all the errors specified in his Bill (*i*). If he proves some of them, he entitles himself to a decree, giving him liberty to surcharge and falsify (*k*), which he may do in the manner above suggested.

It is to be remarked, however, that although an admission by the defendant in the answer accomanying his plea, of an error in the stated account, may be sufficient evidence to induce the Court to open the account, the mere circumstance that the defendant, after the account was settled, confessed that there was an error in the account, and before suit corrected it and paid over the amount, is not a ground upon which the Court will make such a decree (*l*).

(*d*) Beaumont v. Boultbee, 5 Ves. 485, 7 Ves. 599, S. C., 11 Ves. 358, S. C.

(*e*) Vernon v. Vawdry, 2 Atk. 119. In the case of transactions between Trustee and Cestui qui trust, or Guardian and Ward, (Brownell v. Brownell, 2 Bro. C. C. 62,) or between Solicitor and Client, (Matthews v. Wallwyn, 4 Ves 125,) the Court allows a greater latitude.

(*f*) Osborne Williams, 18 Ves. 379, 382.

(*g*) Pit v. Cholmondeley, 2 Ves. 566.

(*h*) Ante, vol. 1, 481.

(*i*) Anon. 2 Freem. 62; Chambers v. Goldwin, 5 Ves 834; Dawson v. Dawson, 1 Atk. 1; Drew v. Power, 1 Sch. & Lef. 192.

(*k*) Twogood v. Swanston, 6 Ves. 486.

(*l*) Davis v. Spurling, 1 R. & M. 64.

Pleas in Bar.

It is to be observed, that where parties are thus at liberty to surcharge and falsify, they are not confined to mere errors of *fact*, but they may take advantage of errors in law (*m*); and where one party is allowed to surcharge and falsify, the other may do so too (*n*).

Of a release.

2. If the plaintiff, or a person under whom he claims, has released the subject of his demands, the defendant may plead the release in bar of the Bill (*o*); and this will apply to a Bill praying that the release may be set aside (*p*).

What is a good release.

A release, however, to be an effectual bar to an account, must be under seal, otherwise it must be pleaded as a stated account only (*q*). But although it is necessary that a release, when insisted upon as such, should have been sealed and delivered, there is no authority for saying that it must have been signed (*r*). It seems that where a person in execution on a judgment has been discharged by his creditors' express order, such discharge being a release of the debt, may be pleaded in bar to a Bill to have satisfaction of the judgment (*s*).

What the plea must contain.

In a plea of release, the defendant must set out the consideration upon which it was made (*t*); for every release must be founded on some consideration, otherwise (as Lord Chief Baron Gilbert says,) fraud must be presumed (*u*). A plea of a release, therefore, cannot extend to a discovery of the consideration; and if that is impeached by the Bill, the plea must be assisted by averments covering the ground upon which the consideration is so impeached (*x*); therefore, where there was a Bill for an account and a discovery of dealings between the parties, to which a release was pleaded, and it appeared that

(*m*) Roberts v. Kuffin, 2 Atk. 112.

(*n*) 1 Mad. Trea. on Eq. 144.

(*o*) Lord Red. 212; Bower v. Swadlin, 1 Atk. 294; Taunton v. Pepler, Mad. & Geld. 166; Clarke v. Earl of Ormonde, Jacob, 116, Roche v. Morgell, 2 Sch. & Lef. 721.

(*p*) Lord Red. 212.

(*q*) Lord Red. 213; For. Rom. 57.

(*r*) Taunton v. Pepler, ubi supr.

(*s*) Beames on Pleas, 221; Beatniff v. Gardiner, 2 Eq. ca. Ab. 73.

(*t*) Lord Red. 212; For. Rom. 57.

(*u*) Roche v. Morgell, 2 Sch. & Lef. 728.

(*x*) Lord Red. 212.

Pleas in Bar.

the release was founded on an account of those dealings made up, Lord Hardwicke held it to be bad, because it extended to a discovery of those dealings, and of the account so made up (*y*).

Of an award.

3. An award may be pleaded in bar to a Bill, which seeks to disturb the matter submitted to arbitration (*z*). It may likewise be pleaded to a Bill to set aside the award and open the account (*a*); and it is not only a good defence to the merits of the case, but likewise to the discovery sought by the Bill (*b*).

May be pleaded to a Bill to set aside the award.

Whether it can be pleaded where the matters in the Bill were referred after Bill filed.

Some discussion has arisen upon the question, whether an an award, made under an agreement, entered into after the Bill has been filed, to refer the matter of the suit to arbitration, can be set up in bar to the Bill by plea put in, in the nature of a plea *puis darrien continuance* at law. The point was much considered by Lord Eldon, in *Rowe* v. *Wood* (*c*), and his opinion appears to have been eventually adverse to such a form of proceeding, the effect of which he considered might have been much more effectually obtained by a motion to stay proceedings in the cause, In *Dryden* v. *Robinson* (*d*), the question was again raised, and although, in the marginal note, it is stated as the opinion of the Court, that an award made under such circumstances may be pleaded, yet, upon reference to the case, it will be found that no such decision was come to, the Court having been of opinion that the plea was bad upon another ground; so that *Dryden* v. *Robinson* can hardly be considered as an authority, especially in the face of the decision in *Rowe* v. *Wood* (*e*), confirmed as it was by the House of Lords upon appeal.

Covenant or agreement to refer to arbitration cannot be pleaded.

It is to be observed, that although an award duly made, will be a good plea in bar to a Bill for the matters concluded

(*y*) Salkeld v. Science, 2 Ves. 107, 8; Roche v. Morgell, 2 Sch. & Lef. 721.

(*z*) Tittenson v. Peat, 3 Atk. 529; Farrington v. Chute, 1 Vern. 72.

(*a*) Lord Red. 211.

(*b*) Lord Red. 211; Tittenson v. Peat, ubi supra.

(*c*) 1 Jac. and W. 315, 2 Bligh's P. C. 505.

(*d*) 2 S. & S. 529.

(*e*) Ubi supra.

by it, a covenant or agreement to refer disputes to arbitrators, as it cannot be made the subject of a Bill for a specific performance(*g*), so neither can it be pleaded in bar to a Bill brought in consequence of such differences (*h*). This seems to be now the established rule of the Court, as recognised in a variety of cases, by which *Halfhide* v. *Fenning* (*i*), the only case where a contrary doctrine appears to have prevailed, has been overruled (*k*).

Pleas in Bar.

Negative averments and answer.

If the Bill impeach the award upon grounds of fraud, corruption, or mistake, those charges must be denied both by averments in the plea, and by answer in support of it; and every other matter stated in the Bill as a ground for impeaching the award, must be denied in the same manner (*l*).

Plea of award by arbitrators.

We have already had occasion to observe, that arbitrators may be made parties to a Bill to set aside an award which is impeached on the ground of gross misconduct on their parts. In such case they may plead the award in bar of all that part of the Bill which seeks a discovery of their motives in making the award; but they must, if charged with corruption or partiality, support the plea by averments and answer, denying such charges, and shewing themselves incorrupt and impartial (*m*).

Plea of an agreement.

4. It has been stated above, that an agreement or covenant to refer matters in dispute to arbitrators cannot be pleaded in bar to a Bill, unless there has been an arbitration and award consequent upon it; the reason of this is, that such an agreement is executory, and an executory agreement is a cause of action only, and cannot be pleaded in bar to another cause of action (*n*). Where an agreement is final, and settles the whole matter, the case is different; therefore, where an administratrix, who was a defendant to a Bill for an account and distribution,

To put an end to a suit must be final,

(*g*) Price v. Williams, cited 6 Ves. 818.

(*h*) Wellington v. Mackintosh, 2 Atk. 570.

(*i*) 2 Bro. C. C. 336.

(*k*) Mitchell v. Harris, 4 Bro. C. C. 311; 2 Ves. Jun. 129, 136, S. C. Satterley v. Robinson, cited 4 Bro. C. C. 316, notis; Street v. Rigby, 6 Ves. 815. Lord Red. 215.

(*l*) Lord Red. 211; Coop. Eq. Pl. 280; Beames on Pl. 231; ante, p. 113.

(*m*) Ante, v. 1. 395.

(*n*) Wood v. Rowe, 2 Bligh, P. C. 595.

Pleas in Bar.

as to all the parties to the suit.

pleaded an inventory duly taken and approved, and an agreement founded thereon, the plea was allowed (*o*). It is to be observed, that an agreement to put an end to a suit must not be final only as between the parties to the Bill to which it is pleaded, but it must be final as to all the parties to the suit compounded by it; if, therefore, an agreement be made subsequent to the filing of a Bill between the parties to the suit and other parties, for the purpose of putting an end to the proceedings in the suit, and for other purposes, it cannot be pleaded in bar to the Bill by one of the parties only. At all events, if it is so pleaded, it must contain averments that all the conditions of the agreement have been performed, or from circumstances could not be performed, and that the other parties not joining in the plea are ready to perform the agreement; indeed all the circumstances by which such an agreement is affected, should be noticed in the averments (*p*).

Averments.

Where it contains executory clauses it cannot be pleaded.

Where an agreement of this sort, which has been entered into for the purpose of putting an end to a suit, contains a great many stipulations and clauses which are executory, it can scarcely be considered as a fit subject for a plea, the object of which is to reduce the subject matter of litigation to a single point, and to avoid the expense which would be incurred by entering into all the subject matter of the dispute; the proper course under such circumstances would be for the party insisting upon the agreement to file a supplemental Bill for the purpose of enforcing it, including all the parties, and all the subjects of the agreement (*q*).

Plea of title.

5. If the defendant's title be paramount to the plaintiff's, he may plead it in bar (*r*). A plea of this nature is called a plea of title, and a title so pleaded will, generally speaking, be founded either,—1. on a long peaceable possession by the

(*o*) Cocking v. Pratt, 1 Ves. 401; vide Belt's Sup. to Ves. 179.

(*p*) Wood v. Rowe, 2 Bligh. P. C. 595.

(*q*) Ibid. and vide Rowe v. Wood, 1 Jac. and W. 315, S. C.

(*r*) Prac. Reg. 328.

defendant, and those under whom he claims; 2dly, on a will; or, 3dly, on a conveyance (*s*).

Pleas in Bar. founded on adverse possession.

1. As, at law, length of time raises a presumption against claims otherwise most clearly made out, so, in equity, a long and peaceable possession may be pleaded in bar to the relief. Thus an undisturbed possession of sixty years or more, was long ago held to be a good subject of plea (*t*). And it appears to be settled, that where there has been adverse possession not accounted for by some disability, such as coverture, or infancy, a Court of Equity will not interfere (*u*).

Adverse possession will bar.

When a title is so stated in a Bill, that there appears to have been a possession adverse to it of above twenty years, without any allegation of disability, the defendant may demur (*x*); but, where the title is not so stated, the defendant must plead the facts necessary to shew the existence of the adverse possession. And it is to be remarked, that a mere general allegation in the Bill, that there have been disabilities arising from infancy or coverture, will not be sufficient to invalidate such a plea.

General allegation of disabilities will not invalidate plea.

Thus, where a Bill was filed setting up an old mortgage, and stating an account settled, and that, owing to infancy, coverture, or other disabilities, the plaintiff could not proceed; and the defendant, as to all the relief and all the discovery prayed, except as to whether he was not in possession, and how long he and those under whom he claimed had been in possession, &c. (which he answered,) pleaded a possession of forty years without account or admission of any debt, the plea was allowed; Lord Loughborough observing that it was a complete answer to the demand, and that infancy and coverture would avail the plaintiff; it was not enough to say, generally, that there had been infancies and covertures, for it was so vague an allegation, that no issue could be taken upon it (*y*).

Plea must state circumstances from which adverse possession is to be inferred.

It is to be noticed, that, in a plea of adverse possession, if the possession is derivative, and has not, during the whole

(*s*) Beames on Pl. 247.
(*t*) Prac. Reg. 328.
(*u*) Cholmondeley v. Clinton, 1 T. & R. 107.
(*x*) Ibid.
(*y*) Blewitt v. Thomas, 2 Ves. J. 669.

Pleas in Bar.

time covered by the plea, been in the defendant himself, the plea must shew in whom the possession was, at the time when the plea first sets it up, and how the defendant deduces his possession from such person; and if the adverse possession is to be inferred from circumstances which do not appear upon the Bill, the defendant must state clearly, upon the face of his plea, the circumstances on which he means to rely as constituting the adverse possession. This appears from *Hardman* v. *Ellames* (z), which has been before noticed. In that case a Bill was filed by a person, claiming as heir at law of a testator, for an account and for the possession of a moiety of an estate, which moiety had been devised by the will to certain uses, all of which had expired or become extinct, except a term of ninety-nine years, created by the will for the purpose of enabling the successive tenants for life to make jointures for their wives, and provision for their children, and it alleged that the trustees of the term, (one of whom claimed the other moiety of the estate by a distinct title,) had entered into possession of the moiety devised, by virtue of the term, and that they or the representative of the survivor had continued in such possession until some time after the year 1815, when the defendant, pretending that he had become entitled to the moiety of the estate not devised by the will, entered into the possession of the estate, and was allowed by the representative of the surviving trustee to receive the rents of the whole; but that he accounted with such representative for a moiety of such rents till some time after the year 1815, since which time he had retained the whole to his own use. To this Bill the defendant put in a plea, the substance of which was, that the last tenant for life under the will had died in March, 1759, and that the title, if any, of the plaintiff, or of the party through whom he claimed the moiety in question, had accrued on the death of such tenant for life, and that the possession of such moiety, and the receipt of the rents thereof, had ever since been adverse to the plaintiff and the person through whom he claimed; but the Vice-Chancellor, Sir J. Leach, overruled the plea, because it did not state

(z) 2 M. & K. 732, ante, p. 122, 127.

Pleas in Bar.

the circumstances upon which the defendant relied to shew that the possession of himself or of those under whom he claimed, were adverse to the plaintiff's title. His Honour's judgment in this case, was afterwards affirmed by Lord Brougham upon appeal (z).

Plea of adverse possession must be accompanied by answer as to documents.

The Vice-Chancellor was also of opinion, in the above case, that the plea was bad, because it was not accompanied by an answer to an allegation in the Bill, that the defendant had in his possession deeds and other documents shewing the truth of the matters stated and charged (a).

Plea of a will.

2. A will may also be pleaded in bar to a Bill brought, on a ground of equity, by an heir at law against a devisee, to turn the devisee out of possession. Thus, where a Bill was brought to set aside a will for fraud, and likewise for a Receiver, on a suggestion that the testator was rendered incapable of making it, by being perpetually in liquor, and particularly when he executed the will; and the defendant pleaded the will, and that it was duly executed; Lord Hardwicke allowed the plea so far as it applied to that part of the Bill which sought to set the will aside, 'because you cannot, in this Court, set aside a will for fraud,' but he would not allow it as to the receiver; for he would not tie up the hands of the Court, in case it should be necessary, in the progress of the suit at law, to have a receiver appointed (b).

Plea of a conveyance.

3. In like manner, upon a Bill filed by an heir against a person claiming under a conveyance from the ancestor, the defendant may plead the conveyance in bar of the suit (c); and so where a Bill was filed by persons claiming under a will, to set aside a conveyance made by the testator, on the ground of fraud, and the defendant pleaded a conveyance by the testator, before the date of his will, of the estate which the plaintiff claimed, the plea was allowed (d).

Title must be deduced to the defendant by proper averments.

It is to be observed, that in all pleas of title, whether derived under a will or a deed, if the defendant is not the person taking immediately under the will or deed, but derives his title through others, the title of the defendant must be de-

(z) Hardman v. Ellames, 2 M. & K. 732; vide Jerrard v. Sanders, 2 Ves. J. 187.

(a) Vide ante, ubi supra.

(b) Anon. 3 Atk. 17.

(c) Lord Red. 214.

(d) Howe v. Duppa, 1 V. & B. 511.

Pleas in Bar.

Must have a commencement prior to the plaintiffs.

duced from the person immediately taking by proper averments in the plea. And in all cases it is necessary, whether the title be derived from adverse possession, or from a will or conveyance, to shew that it had a commencement anterior to that of the plaintiff's title as shewn by the Bill; a title posterior to that of the plaintiff will not avail as a plea, unless it be some way connected with the plaintiff's title: thus where a Bill was filed by one claiming either as heir *ex parte materna* of the person last seized, or as a remainder-man under the limitations of a prior settlement, charging that the person last seized had only a life interest in the property, and that it would so appear if the contents of a certain deed, executed in 1730, and within the power of the defendant, were set forth; and the defendant pleaded that, in the year 1796, the person last seized being tenant in tail in possession, had duly suffered a recovery of the estates in question to the use of himself in fee, and had subsequently devised them to the defendant, the plea was overruled; because the defendant, relying upon a subsequent title which he had not connected in any way with the ground of the title upon which the defendant stood, had not denied that title, or the substantial part of it, nor the possession or existence of the deed of 1730 (*e*).

Plea of purchase for valuable consideration without notice.

6. From what has been above stated, it is obvious that where a conveyance is insisted upon by plea, as an adverse title, it must bear date at a period anterior to the commencement of the plaintiff's title, as shewn by the Bill; there are cases, however, in which a conveyance may be insisted upon, though posterior in point of date, to the plaintiff's title. In such cases, however, it is necessary to the validity of the plea, that the conveyance should have been for a valuable consideration, and that, at the time it was perfected, the defendant or the person to whom it was made, should not have had notice of the plaintiff's right. A plea of this sort is called a

(*e*) Hungate v. Gascoigne, 1 R. & M. 698. Vide etiam, Jackson v. Rowe, 4 Russ. 514.

Pleas in Bar.

plea of purchase for a valuable consideration without notice, and it is founded on this principle of Equity, viz. that where the defendant has an equal claim to the protection of a Court of Equity to defend his possession, as the plaintiff has to the assistance of the Court to assert his right, the Court will not interpose an either side (*f*).

By purchaser with notice from a purchaser without.

It is to be observed, that a purchaser with notice from a purchaser without notice, may shelter himself under the first purchaser (*g*).

But notice to an agent is notice to the principal (*h*); and where a person having notice purchased of another who had no notice, and knew nothing of the purchase, but afterwards approved it, and without notice paid the purchase money and procured a conveyance, the person first contracting was considered, from the beginning, as the agent of the actual purchaser, who was therefore held affected with notice (*i*).

Marriage settlement equivalent to a purchase for valuable consideration.

A settlement, in consideration of marriage, is equivalent to a purchase for a valuable consideration, and may be pleaded in the same manner (*k*). If a settlement is made after marriage, in pursuance of an agreement before marriage, the agreement as well as the settlement must be shewn (*l*). A widow, defendant to a suit brought by any person claiming under her husband to discover her title deeds to lands of which she is in possession as her jointure, may plead her settlement in bar to any discovery, unless the plaintiff offers and is able to confirm her jointure (*m*); but a plea of this nature must set forth the

(*f*) Lord Red. 222; upon this principle it has been held that a purchase for valuable consideration, though a good defence, is not good as a ground for filing a cross Bill; Patterson v. Slaughter, Amb. 293.

(*g*) Lord Red. 224; Brandlyn v. Ord, 1 Atk. 571; Lowther v. Carlton, 2 Atk. 139, 242; Ca. T. Talbot, 187; Sweet v. Southcote, 2 Bro. C. C. 66. cited Amb. 313; M'Queen v. Farquhar, 11 Ves. 478; Hiern v. Mill, 13 Ves. 120; and vide Harrison v. Forth, Prec. in Chan. 51.

(*h*) Lord Red. 224; Brotherton v. Hatt, 2 Vern. 574; Le Neve v. Le Neve, 3 Atk. 646; Maddox v. Maddox, 1 Ves. 62; Ashley v. Baillie, 2 Ves. 370; Hiern v. Mill, 13 Ves. 120; Mountford v. Scott, 3 Mad. 34.

(*i*) Lord Red. 224; Jennings v. Moore, 2 Vern. 609; Blenkarne v. Jennens, 2 Bro. P. C. 278.

(*k*) Lord Red. 225; Harding v. Hardrett, Finch, 9.

(*l*) Lord Red. 225; Lord Keeper v. Wyld, 1 Vern. 139.

(*m*) Lord Red. 225; ante, p. 55.

Pleas in Bar.

settlement and the lands comprised in it with sufficient certainty (*m*).

Whether a good bar to a legal title. *Quære.*

Some doubt appears to be entertained whether a plea of purchase for valuable consideration will avail against a legal title. The point has been fully discussed by Sir Edward Sugden in his Treatise on the Law of Vendors and Purchasers, where the cases upon the subject, which are somewhat conflicting, will be found (*n*). The learned writer's opinion appears to be in favour of the doctrine, that such a plea will be protection against a legal as well as an equitable claim, although in a very recent case the late Master of the Rolls, Sir J. Leach, appears to have entertained a contrary opinion (*o*).

Form of Pleas.

The rules for the guidance of a pleader framing pleas of this description, have been so clearly and succinctly laid down by the learned author of the treatise last referred to, that the writer feels he cannot do better on the present occasion than call his reader's attention to the following extracts from that valuable work, viz. (*p*), ' The plea must state the deeds of purchase, setting forth the dates, parties, and contents, briefly, *and the time of their execution* (*q*), for that is the peremptory matter in bar (*r*) (*s*).

Averments.

' It must aver that the vendor was seized, or pretended to be seized, at the time he executed the conveyance (*t*). In *Carter* v. *Pritchard* (*u*) it was held, that the plea of a purchase without notice must aver the defendant's *belief*, that the person from

(*m*) Lord Red. 225; Petre v. Petre, 3 Atk. 511; Pyncent v. Pyncent, 3 Atk. 571; Senhouse v. Earl, 2 Ves. 450; Leech v. Trollop, ib. 662.

(*n*) Sugden on Vendors, vol. 2, 308.

(*o*) Collins v. Archer, 1 Russ. & M. 284.

(*p*) Sugden on Vendors, vol. 2, p. 304.

(*q*) Query this, as the plaintiff might thereby be enabled to proceed against the defendant at law. See Anon. 2 Cha. Ca. 161; in Day v. Arundel, Hard. 510, it was expressly held, that the time of the purchase need not be stated in the plea.

(*r*) See Gilb. For. Rom. 58; Aston v. Aston, 3 Atk. 302, and 2 Ves. 107, 396; and see Wallwyn v. Lee, 9 Ves. 24.

(*s*) It seems that the practice formerly was to extend the plea to the discovery even of the purchase deeds; and in Watkins v. Hatchet, 1 Eq. Ca. Ab. 33, pl. 3, although the purchaser improvidently offered to produce his purchase deeds, yet the Court would not bind him to do so.

(*t*) Story v. Lord Windsor, 2 Atk. 630; Head v. Egerton, 3 P. Wms. 279; and see 17 Ves. 290; Jackson v. Rowe, 4 Russ. 514.

(*u*) Michaelmas Term, 12 Geo. 2, 1739; 2 Vivian's MS. Rep. 90, in Lincoln's Inn Library; see Jackson v. Rowe, 4 Russ. 514.

whom he purchased was seized in fee. If it be charged in the Bill that the vendor was only tenant for life or tenant in tail, and a discovery of the title be prayed, such a discovery cannot be covered unless a seisin is sworn in the manner already mentioned, or that such fines and recoveries were levied and suffered as would bar an entail if the vendor was tenant in tail; for, if a purchase by lease and release should be set forth, which would pass no more from the tenant in tail than it lawfully may pass, and that is only an estate for the life of the tenant in tail (*x*), then there is no bar against the issue (*y*). Where, however, a fine is pleaded, the plea must aver an *actual* seisin of a freehold in the vendor, and not that he was seized or pretended to be seized (*z*).

'If the conveyance pleaded be of an estate in possession, the plea must aver that the vendor was in possession at the time of the execution of the conveyance (*a*). And, if it be of a particular estate and not in possession, it must set out how the vendor became entitled to the reversion (*b*) But, although a Bill be brought by an heir, the plea need not, on that account, aver the purchase to be from the plaintiff's ancestor (*c*).

'The plea must also distinctly aver that the consideration money, mentioned in the deed, was *boná fide* and truly paid (*d*), independently of the recital of the purchase deed (*e*); for if the money be not paid, the plea will be overruled (*f*), as the purchaser is entitled to relief against payment of it (*g*); the particular consideration must, it should seem, be stated (*h*), although this point has been decided otherwise (*i*). There can, however, be

(*x*) This is the doctrine of Littleton, with which it seems, Gilbert agrees; but since Littleton's time it has been held, that the releasee has a base fee determinable by the entry or action of the issue. See Butler's n. (1), to Co. Litt. 331, a, and the authorities there referred to. But now estates tail may be barred by deed. 3 & 4 Wm. 4. c. 74.

(*y*) Gilb. For. Rom. 57.

(*z*) Story v. Lord Windsor, 2 Atk. 630, and see Page v. Lever, 2 Ves. Jun. 450; Dobson v. Leadbeater, 13 Ves. 230.

(*a*) Trevanian v. Mosse, 1 Vern. 246; and 3 Ves. 226; 9 Ves. 32; vide etiam, Jackson v. Rowe, 4 Russ. 514.

(*b*) Hughes v. Garth, Amb. 421.

(*c*) Seymour v. Nosworth, 2 Freem. 128; 5 Cha. Rep. 23; Nels. Cha. Rep. 135.

(*d*) Moor v. Mayhow, 1 Cha. Ca. 34. See 2 Atk. 241.

(*e*) Maitland v. Wilson, 3 Atk. 814.

(*f*) Hardingham v. Nicholls, 3 Atk. 304.

(*g*) See supra, vol. 1, p. 554.

(*h*) Millard's case, 2 Freem. 43, and Snag's case, cited ib., and see Wagstaff v. Read, 2 Cha. Ca. 156.

(*i*) Moor v. Mayhow, 1 Cha. Ca. 34; Day v. Arundell, Hard. 510.

Pleas in Bar.

no objection to state the consideration, as, if it be valuable, the plea will not be invalidated by mere inadequacy (*k*). The question is, not whether the consideration is adequate, but whether it is valuable. For if it be such a consideration as will not be deemed fraudulent within the statute 27th Elizabeth, or is not merely nominal (*l*), or the purchase is such a one as would hinder a *puisne* purchase from overturning it, it ought not to be impeached in equity.

'The plea must also deny notice of the plaintiff's title or claim (*m*) previously to the execution of the deed and payment of the purchase money (*n*); for, till then, the transaction is not complete; and, therefore, if the purchaser have notice previously to that time, he will be bound by it (*o*); and the notice so denied, must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title (*p*). But a denial of notice, at the time of making the purchase and paying the purchase money, is good; and notice *before* the purchase need not be denied, because notice before is notice at the time of the purchase, and the party will, in such case, on its being made appear that he had notice before, be liable to be convicted of perjury (*q*).

'The notice must be positively and not evasively denied (*r*), and must be denied whether it be or be not charged by the Bill (*s*). If particular instances of notice or circumstances of fraud are charged, the facts from which they are inferred must be denied as specially and particularly as charged (*t*).'

(*k*) Basset v. Nosworthy, Finch. 102. Ambl. 767; Mildmay v. Mildmay, Ambl. 767, cited Bullock v. Sadlier, Ambl. 764.

(*l*) See Moor v. Mayhow, 1 Cha. Ca. 34; Wagstaff v. Read, 2 Cha. Ca. 156.

(*m*) Lady Bodmin v. Vendebendy, 1 Vern. 179; Anon. 2. Ventr. 361. No. 2.

(*n*) Moor v. Mayhow, 1 Cha. Ca. 34; Story v. Lord Windsor, 2 Atk. 630; Attorney-General v. Gower, 2 Eq. Ca. Ab. 685. pl. 11.

(*o*) Vide supra, vol. 2, p. 274.

(*p*) Kelsall v. Bennett, 1 Atk. 522, which has overruled Bramton v. Barker, 2 Vern. 159, cited.

(*q*) Jones v. Thomas, 3 P. Wms. 243.

(*r*) Cason v. Round, Prec. in Cha. 226; and see 2 Eq. Ca. Abr. 682. (D.) n. (b).

(*s*) Aston v. Curzon, and Weston v. Berkely, 3 P. Wms. 244. n. (f); and see the 6th resolution in Brace v. Duke of Marlborough, 2 P. Wms. 491.

(*t*) Meder v. Birt, Gilb. Eq. Rep. 185; Radford v. Wilson, 3 Atk. 815; and see Jerrard v. Saunders, 2 Ves. junr. 187; 4 Bro. C. C. 322; 6 Dow. 230.

Pleas in Bar.

'But the defendant need only by his plea deny notice generally, unless where facts are specially charged in the Bill as evidence of notice (*x*).

Answer in support of.

'Notice must also be denied by answer, for that is matter of fraud and cannot be covered with the plea, because the plaintiff must have an opportunity to except to its sufficiency if he think fit (*y*); but it must also be denied by the plea, because otherwise there is not a complete plea in Court on which the plaintiff may take issue (*z*).

'Although a purchaser omit to deny notice by answer, he will be allowed to put in the point of notice by way of answer (*a*), and the omission will not invalidate his plea, if it is denied by that (*b*). If notice is omitted to be denied by the plea, and the *plaintiff reply to it*, the defendant has then only to prove his purchase; and it is not material if the plaintiff do prove notice as he has waved setting down the plea for argument, in which case it would have been overruled (*c*). If, however, a Bill is exhibited against a puchaser, and he plead his purchase, and the Bill is therefore dismissed, a new Bill will lie charging notice, if the point of notice was not charged in the former Bill, or examined to; and the former proceedings cannot be pleaded in bar (*d*). But if notice is neither alleged by the Bill nor proved, and the defendant by his answer deny notice, an inquiry will not be granted for the purpose of affecting him with notice (*e*).

'A plea of a purchase for valuable consideration without notice, will not be allowed where the purchaser might, by due diligence, have ascertained the real state of the title (*f*).

'If a purchaser's plea of valuable consideration without notice be falsified by a verdict at law, and thereupon a decree is made

(*x*) Pennington v. Beechey, 2 S. & S. 282; Thring v. Edgar, 2 S. & S. 274. This rule will not, however, apply to an answer in support of a plea, unless the plea is negative. *Vide ante*, p. 121, et seq.

(*y*) Anon. 2 Cha. Ca. 161; Price v. Price, 1 Vern. 185.

(*z*) Harris v. Ingledew, 3 P. Wms. 91; Meadows v. Duchess of Kingston, Mitf. on Plead. 2nd ed. 216. n.

(*a*) Anon. 2 Cha. Ca. 161.

(*b*) Coke v. Wilcocks, Mos. 73.

(*c*) Harris v. Ingledew, 3 P. Wms. 91; Eyre v. Dolphin, 2 Ball. & B. 302.

(*d*) Williams v. Williams, 1 Cha. Ca. 252.

(*e*) Hardy v. Reeves, 5 Ves. 426.

(*f*) Jackson v. Rowe, 2 S. & S. 472, 4 Russ. 514.

Pleas in Bar.

against the purchaser, and he then carries an appeal to the House of Lords, it will be dismissed and the decree affirmed without further inquiry (*g*).'

It is to be noticed, that a plea of purchase for a valuable consideration protects a defendant from giving any answer to a title set up by the plaintiff; but a plea of bare title only without setting forth a consideration is not sufficient for that purpose (*h*). It will also protect a defendant from the discovery of deeds and writings, except of the purchase deed which is pleaded (*i*).

Pleas to discovery.

All the grounds of pleas above enumerated go to the relief prayed by the Bill; and, as we have seen, if they are sufficient to protect the defendant from the relief prayed, they will also serve to protect him from the discovery sought, except so far as such discovery is material to enable the plaintiff to avoid the effect of the matter pleaded. There are, however, as has been already stated, certain cases in which, though the plaintiff may be entitled to relief, the defendant will be protected from making either the whole or some part of the discovery sought by the Bill, because the situation in which he is placed renders it improper for a Court of Equity to compel a discovery, either because the discovery may subject him to pains and penalties, or to forfeiture, or something in the nature of a forfeiture; or because it would betray the confidence reposed in him as a legal adviser, or as an arbitrator. The cases, in which this exemption from discovery can be insisted upon, have been before pointed out, and the principles upon which they rest discussed, in treating of demurrers (*k*); all that need, therefore, be now said in addition is, that if the facts upon which the defendant rests his claim to exemption from the discovery sought do not appear upon the Bill, they may be presented to the Court by plea.

(*g*) Lewes v. Fielding, Colles's P. C. 361.

(*h*) Brereton v. Gamul, 2 Atk. 241.

(*i*) Salkeld v. Science, 2 Ves. 107.

(*k*) Ante, p. 45.

Pleas in Bar.

To amended Bill.

It has been already stated, that a defendant may not only answer an amended Bill, but he may defend himself from the effect of the amendments by a demurrer or plea (*k*); pleas to amended Bills may be put in upon the same grounds as pleas to original Bills. But it is to be observed that, if a defendant has answered the original Bill, his answer may be read to counterplead his plea to the amended Bill; and that if, upon so reading it, it should appear that the facts stated upon the answer to the original Bill would operate to avoid the defence made by the plea to the amended Bill, the plea will be overruled (*l*).

Sect. III.

Of the Form of Pleas.

Title.

A plea is preceded by a title in the following form:—"*The Plea of A. B.* a defendant, to the Bill of complaint of X. Y. complainant;" or, "*The joint and several plea of A. B.* and *C. D. defendants, &c.*" Where it is the plea of a man and his wife, the words "and several" should not be inserted; but where an objection was taken to a plea by Baron and Feme, on the ground that they were so inserted, the Vice-Chancellor, Sir J. Leach, considered the term "several" as meaning nothing, and that, being mere surplusage, it did not vitiate the plea (*a*). It has been before stated, that where a plea was prepared as a joint plea of a husband and wife, but the wife refused to swear to it, whereupon the husband put in the plea and applied that it should stand for himself, it was so ordered (*b*).

Where by Husband and Wife.

Where accompanied by answer.

Where a plea is accompanied by an answer, it must be entituled "The plea and answer," or "*The joint plea and answer,*" or "*The joint and several plea and answer,*" according to the circumstances.

(*k*) Ante, vol. 1. p. 550.

(*l*) Lord Red. 242; Hyllard v. White, ib.; Noel v. Ward, 1 Mad. 322; Hildyard v. Cressy, 3 Atk. 303.

(*a*) Fitch v. Chapman, 2 S. & S. 31.

(*b*) Ante, vol. 1. 209; Pain v. ———, 1 C. C. 269; Pavie v. Arcourt, 1 Dick. 13.

Where accompanied by answer.

Protestation.

A plea, like a demurrer, is introduced by a protestation against the confession of the truth of any matter contained in the Bill (*c*).

Statement of the part of Bill to which it applies.

The extent of the plea, that is, whether it is intended to cover the whole Bill or a part of it only, and what part in particular, is usually stated in the next place; and this, as before observed, must be clearly and distinctly shewn (*d*). The rules in this respect, are the same as those laid down with regard to demurrers to part of the Bill only (*e*); and in the application of them the same, if not a greater, degree of accuracy is necessary; for as, on the one hand, the Court is always very strict in preserving to the plaintiff the right, which he has, to a full discovery from the defendant of all matters not covered by the plea, for the purpose of enabling him to negative the matters pleaded; so, on the other hand, the Court is always watchful to enforce the rule which it has adopted, that a defendant who answers at all must answer fully (*f*), and to overrule any plea, the answer accompanying which extends to any part of the Bill which the plea professes to cover, upon the ground that, as the defendant has thought proper to answer to part of the matter pleaded to, he has waived the protection of his plea, and must answer the rest (*g*).

(*c*) Lord Red. 242. The reasons for the introduction of this form have been before alluded to. (Ante, p. 68.) It may be observed here, that, at common law, protestation in pleading has been declared unnecessary, by Reg. Gen. Hil. T. 4 W. 4, Reg. 12.

(*d*) Lord Red. 242.

(*e*) Ante, p. 75.

(*f*) Vide post, chap. xv.

(*g*) The author trusts that he shall not be accused of presumption, in suggesting, that the Courts are frequently too rigid in their application of the above rule; and that by the strictness with which they have adhered to it, they have so much increased the difficulty of pleading, when the plea is to be accompanied by an answer, as to render the task of framing one nearly hopeless. That the rule which says, 'that a defendant shall not accompany his plea by an answer to any part of the Bill covered by his plea,' is perfectly correct as a general rule, is indisputable;—to permit a defendant who submits to the Court a reason why he should not be called upon to answer either the whole or a particular part of the Bill, to proceed by the same instrument to give an answer to what he so protests against answering, would be absurd; but to say, that a defendant, having by his plea shewn to the Court a valid objection to his being called upon to answer a portion of the Bill, should be deprived of the benefit of his objection, merely because (by the mistake or inadvertence of the pleader, or perhaps from his over-anxiety to give a sufficient answer to those parts of the Bill to which he is bound to answer,) he

General requisites.

Where plea is supported by an answer as to part.

It may be observed here, that where a plea is to the whole of the relief sought by the Bill, but it is necessary that the defendant should support his plea by an answer as to facts stated, which may avoid the bar, the plea must not extend to the whole Bill, but should be in the form of a plea *to all the relief and all the discovery sought by the Bill, except certain parts of the discovery,* (which are to be answered)(*c*); and in framing the plea, the pleader must be careful to except from the discovery, sought to be covered by the plea so much of it as avoids the bar, he should then plead the bar, and deny by answer the parts excepted. In doing this, great care is necessary not to include, in the part to be excepted out of the plea for the purpose of being answered, any portion of that which ought to be covered by the plea; as the consequence of including it will be, not only to render the plea an incomplete bar, but to overrule it by the answer: thus where the whole equity of a Bill consisted in a promise which was stated to have been made by a legatee, to a testatrix at the time of executing a codicil to her will, on the faith of which she acted in making it, and the defendant, intending to deny the promise by a negative plea, excepted out of the part of the Bill to which he proposed his plea should apply, the allegation of the promise itself, and then denied the promise by his answer, Lord Cottenham held that the plea was bad in form. In the course of his judgment upon the above occasion, his lordship, after observing that the object of excepting certain passages out of the Bill, is to take from the Bill those allegations which, it is supposed by the pleader, are introduced for the purpose of establishing the affirmative of

has gone a step further than he ought to have done, and given an answer to some matter from his liability to answer which he has protected himself by his plea, does appear by the writer to be equally, if not more absurd. The fact is, that in framing a plea of this nature, a pleader has often only a choice of two evils, viz.—that of endangering his plea by answering too little, or that of rendering it liable to be overruled by answering too much; and it appears to the writer, that as long as he keeps clear of the fault of not giving to the plaintiff all the discovery he has a right to insist upon, it is hard to visit him with the same consequences that he would have incurred if he had ansered too little, because he has been somewhat more profuse in his discovery than he might have been.

(*c*) Lord Portarlington v. Soulby, 6 Sim. 356.

General requisites.

what the Bill alleges, and which are therefore very properly excluded from the plea, made the following remarks—' What I particularly observe upon is, that first it (i. e. the plea,) takes out of the Bill the allegation of the promise, and then denies it; now I apprehend that this is not correct, and that no such plea can be supported; a negative plea is a mere traverse, it differs from an ordinary plea, the ordinary plea admitting the truth of the Bill, but stating some matter *dehors*, which destroys the effect of the allegation, and which, admitting the allegation to be true, would be a defence; but a negative plea is a mere traverse of that which constituted the plaintiff's title;—now to traverse that which is not alleged on the face of the Bill, to take out of the Bill an allegation, and then by plea to negative that allegation, is a mode of proceeding which leaves the record in such a state that it is impossible at any time afterwards to deal with it (*d*).

It is to be noticed that, in the above case, the rule laid down in *Thring* v. *Edgar* (*e*), which has been before discussed at considerable length (*f*), was strictly followed in framing the Bill, and that the charges which were introduced by way of establishing the affirmative of the plaintiff's case, were introduced by the words '*And as evidence of the matters aforesaid, your orator charges*, &c.' It is somewhat remarkable, however, that the same defect existed in the plea in *Thring* v. *Edgar*, as that on account of which the Lord Chancellor overruled the plea in *Denys* v. *Shuckburgh* (*g*), and was pointed out by his Lordship in his judgment.

It is also to be noticed, that although, in the above case, the portion of the Bill intended to be answered is spoken of as a 'part to be excepted out of the plea,' it is not necessary, in form, that such part should be pointed out *by way of exception;* the defendant may either frame his plea in the form above stated, *as to all the relief and all the discovery sought by the Bill, except* the part he intends to answer, or he may specify distinctly the portion of the Bill which he intends the plea to

(*d*) Denys v. Shuckburgh, Law, J. vol. 6, N. S. 330.

(*e*) 2 S. & S. 274.

(*f*) Ante, 110, 123.

(*g*) Ubi supra.

cover, in the following manner, '*as to so much of the said Bill as seeks from this defendant a discovery whether,*' &c. In both cases, however, whether the part to be pleaded to is pointed out by exception or specification, the rules laid down in *Denys* v. *Shuckburgh* must be attended to.

General requisites.

Statement of matter pleaded.

The matter relied upon as an objection to the suit or Bill, generally follows, accompanied by such averments as are necessary to support it (*h*); and it is to be noticed, that where a plea is of matter which shews an imperfection in the frame of the suit, it should point out in what that imperfection consists. Where, for instance, a plea is for want of parties, it must not only shew that there is a deficiency of parties, but should point out who the parties are that are required. Thus, in *Merewether* v. *Mellish* (*i*), where a defendant pleaded a settlement for the purpose of shewing that there were certain parties not before the Court who were interested in the suit, but did not aver that there was a deficiency of parties, or that the persons appearing by the settlement to be interested were necessary parties, the plea was held to be informal, and leave was given to amend it.

General requisites.

The general requisites of a plea have been already discussed at considerable length; it is unnecessary, therefore, now to allude to them further than to remind the reader, that they must be founded upon matter not apparent upon the face of the Bill (*k*);—they must reduce the case to a single point (*l*), except where leave has been obtained to plead double (*m*), and they must be supported by proper averments (*n*).

Must be certain.

In addition to the above requisites, it may be added, that a plea must be certain; it must tender issuable matter, the truth or falsehood of which may be replied to or put in issue (*o*), and that not in the form of general propositions, but specifically and distinctly; therefore, where a plea was put in by the East India Company to a Bill filed by the Nabob of Arcot (*p*), in which they stated, that by charters confirmed by act of parliament, they had certain powers under which particular acts

(*h*) Lord Red. 242.
(*i*) 13 Ves. 438.
(*k*) Ante, p. 97.
(*l*) Ibid. 102.
(*m*) Ibid. 104.
(*n*) Ibid. 107.
(*o*) Nabob of Arcot v. E. I. Company, 3 Bro. C. C 292.
(*p*) Ibid.

General requisites.

were done, the plea was overruled, because it did not set forth the contents of those charters and acts of parliament.

Must go to the whole case.

A plea must also cover the whole case made by the Bill, or by that part of it which the plea affects to cover, otherwise it will be overruled. Thus, where a Bill was filed for a foreclosure of a messuage and forty acres of land, and the defendant pleaded an absolute title in himself to certain property mentioned in the deeds, by which he deduced his title, consisting of a messuage and tenement, averring that they were the same which were meant by the Bill, the Court of Exchequer thought the plea could not be considered as relating to the forty acres of land mentioned in the Bill, and overruled it (*q*). And so where, to a Bill praying a reconveyance of four estates, the defendant put in a plea of a fine and non-claim as to one, averring that the estate comprised in the fine was the only part of the estates comprised in the Bill to which he had or claimed a right; the plea was, in like manner, overruled (*r*). In like manner, where a Bill prayed an account of rents and profits, and also that the defendant might be restrained from setting up outstanding terms, and the defendant pleaded that there were no outstanding terms, Sir John Leach held the plea to be bad, because it left part of the case untouched (*s*).

Language of.

With respect to the language of pleas, the reader's attention is recalled to the observations made in another part of this work (*t*), in which, in the framing even of Bills, the propriety of adhering to the known technical language of the Courts, in all cases where such language is applicable to the case, has been discussed; it only remains to add, that if such an adherence to the ancient recognized forms of pleading is desirable in the case of Bills, it is still more so in the case of pleas, in which, as has been before stated, there must, in general, be the same

(*q*) Wedlake v. Hutton, 3 Anst. 633.

(*r*) Watkins v. Stone, 2 Sim. 49.

(*s*) Barker v. Ray, 5 Mad. 64; vide etiam Hook v. Dorman, 1 S. & S. 227; vide etiam Hoare v. Parker, 1 Cox. 224; 1 Bro. C. C. 578. S. C. Lord Red. 223 n. ante.

(*t*) Ante, vol. 1, p. 416.

strictness, at least in matters of substance, as in pleas at law. The same observation may, however, be repeated here, which has been made in the part of this book before referred to, namely, that although the use in pleadings in equity of such technical expressions as have been adopted in pleadings at common law is desirable, it is not absolutely necessary; and that the same thing may be expressed in any terms, which the pleader may select as proper to convey his meaning, provided they are adequate to the purpose (*x*). All the parts, however, which are necessary to render the plea a complete equitable bar to the case made by the Bill, so far as the plea extends, must be clearly and distinctly averred, in order that the plaintiff may take issue upon it (*y*). And it is to be observed, that averments in general ought to be positive (*z*). In some cases, indeed, a defendant has been permitted to aver according to the best of his knowledge and belief, as that an account is just and true (*a*); and in all cases of negative averments, and of averments of facts not within the immediate knowledge of the defendant, it may seem improper to require a positive assertion. It however is the opinion of Lord Redesdale, that unless the averment is positive, the matter in issue appears to be not the fact itself, but the defendant's belief of it; and that in all cases, therefore, averments should be positive, as the conscience of the defendant is saved by the nature of the oath administered, which is, that so much of the plea as relates to his own acts is true, and that so much as relates to the acts of others he believes to be true (*b*).

General requisites.

Averments.

It may be observed here, that a plea, like any other proceeding in a cause, may be the subject of a reference for impertinence (*c*).

Impertinence.

The plea having stated the facts upon which it is founded, commonly concludes with a repetition, that the matters so offered are relied upon as an objection or bar to the suit, or to so much of it as the plea extends to, and then prays the judgment of the Court, whether the defendant ought to be com-

Conclusion.

(*x*) Ante, vol. 1, p 468.
(*y*) Lord Red. 240.
(*z*) Foster v. Vassall, 3 Atk. 590.
(*a*) Anon. 3 Atk. 70; Tothill, 70.
(*b*) Lord Red. 240.
(*c*) Dixon v. Olmius, 1 Cox, 412.

Conclusion.

pelled further to answer the Bill, or such part as is pleaded to (*d*). Much learning is scattered over the books upon the manner in which pleas at law should conclude; but it does not appear, that any particular form of conclusion is necessary in pleas in equity. Some of the old forms of pleas to the *jurisdiction* conclude by praying the judgment of the Court, 'whether it will hold plea upon, and enforce the defendant to answer the Bill for the cause aforesaid'; whilst other precedents, with less precision, demand judgment of the Court, 'whether the defendant shall be compelled to make further or other answer(*e*).' The form of pleas in equity to the person, are tolerably uniform in concluding, by praying judgment of the Court, whether the defendant shall be compelled to make any further answer, during the existence of the disability pleaded (*f*). The precedents of pleas in bar, generally, conclude with pleading the matter set up, *in bar* of the discovery and relief, or of the discovery, (as the case may be,) and demand judgment of the Court, whether the defendant shall be compelled to make further or other answer to the Bill, praying to be dismissed with costs, a prayer that is sometimes added and sometimes omitted. They do not, however, always state, that the matter is pleaded *in bar* (*g*).

To the jurisdiction.

To the person.

—— in Bar.

Where accompanied by answer.

Where a plea is accompanied by an answer, the answer must follow the conclusion of the plea. If the answer is merely to support the plea, it is stated to be made for that purpose, "not waiving the plea" (*h*). If the plea is to part of the Bill only, and there is an answer to the rest, it is expressed to be an answer to so much of the Bill as is not before pleaded to, and is preceded by the same protestation against waiver of the plea (*i*).

Signature by Counsel.

A plea must be signed by Counsel, unless taken by commissioners in the country (*k*); and it is a rule, that all pleas, as well as answers, whether taken by commission or sworn before a master, must be signed by the parties swearing the same in the presence of the master, or of the commissioners before whom the same shall be taken respectively (*l*). It seems,

(*d*) Lord Red. 243.
(*e*) Beames on Pl. 49.
(*f*) Ibid.
(*g*) Ibid.
(*h*) Lord Red. 243.
(*i*) Ibid.
(*k*) Simes v. Smith, 4 Mad. 366.
(*l*) Beames' Ord. 452; 2 Atk. 289.

however, that where pleas are not to be sworn to, they may be received and filed, though under the hand of Counsel only (m).

Oath. &c.

In what cases plea must be upon oath.

It is said by the noble and learned author of the Treatise on the Pleadings in the Court of Chancery, that 'pleas to the jurisdiction of the Court, or in disability of the person of the plaintiff, as well as pleas in bar of any matter of record, or of matters recorded, or as of record in the Court itself, or any other Court, may be put in without oath' (n); and the proposition is so laid down by his Lordship, upon the authority of a book, whose authority is usually considered as entitled to weight (o). It appears, however, to the author, that the proposition is laid down too broadly; for although it is true, that many pleas to the jurisdiction may be put in without oath, and that pleas of outlawry or excommunication, which are pleas to the person of the plaintiff, may be put in, in a similar manner, yet it is by no means the fact, that *all* pleas to the jurisdiction, or any other pleas to the person than those above specified, can be so treated. Thus it has been held, that a plea of privilege, because the defendant is an officer of another Court, which is in effect a plea to the jurisdiction, ought to be upon oath (p). So a plea of the bankruptcy of the plaintiff, which is a plea to the person, was, before the establishment of the Court of Bankruptcy, required to be upon oath (q).

Wherever the truth of the plea must be established at the hearing upon oath.

Perhaps the best mode to be adopted by the practitioner, for determining the question as to a plea being or not being upon oath, will be to consider how far it will be necessary, in the event of the plea being considered valid, and issue being joined upon it, to establish its truth by evidence upon oath at the hearing; and in all cases where such evidence upon oath would be required at the hearing, to let the plea be accompanied by the oath of the defendant; for the principle upon which the Court acts, in requiring pleas to be put in upon oath, is, that it will not permit a defendant to delay or evade the discovery sought by the plaintiff, unless he will first pledge

(m) Beames' Ord. 172.
(n) Lord Red. 243.
(o) Prac. Reg. 324.
(p) Gibson v. Whitacre, 2 Vern. 83.
(q) Joseph v. Tuckey, 2 Cox, 44. *Quære!* Whether it may not now be pleaded as a record of the Court of Bankruptcy?

Oath, &c.

his oath to the truth, (or at least to his belief of the truth,) of the facts upon which he relies, in all cases where the facts are those of which the Court does not take judicial notice.

Not in cases where the Court will take judicial notice of the fact pleaded.

The matters of which the Court will take judicial notice, have been before enumerated (*r*); and amongst them it will be found, that the Court of Chancery takes judicial notice of the existence and course of proceeding of the superior Courts at Westminster, and the other Courts of general jurisdiction. It will also receive as evidence, which does not require the sanction of an oath, copies, properly authenticated, of the records of all other Courts of Record. It also pays attention to its own proceedings, although not actually recorded. When, therefore, any matter is introduced into a plea which involves the existence or jurisdiction of the Courts of Record above alluded to, or which can be proved by the production of the records of other Courts, or authenticated copies of them, or by inspection of its own proceedings, no oath is required. Thus, for instance, if a Bill is filed concerning land within the jurisdiction of a county palatine against defendants resident within that jurisdiction, a plea that the subject is cognizable in the Court of the County Palatine will be sufficient, although not upon oath; because the Court, as we have seen, takes judicial notice of the existence or jurisdiction of the Court of the County Palatine; and as it appears by the Bill, that the land in question is within that jurisdiction, the Court requires no other evidence to establish the truth of the plea. If, however, any extraneous matter shall have been introduced into the plea for the purpose of shewing that the subject is within the jurisdiction of the County Palatine, which matter, if issue should be joined upon the plea, it would be necessary to establish by depositions at the hearing; in such a case, it is apprehended the plea must be accompanied by the oath of the defendant. So also with regard to pleas of matters of record; if the matter pleaded is purely matter of record, or in other words which may be proved by the record, the oath of the party is not necessary; but if any fact *in pais* is introduced, which, in order to

—— unless extraneous circumstances are introduced;

Nor matters of record.

Unless matters *in pais* are introduced.

(*r*) Ante, p. 23

Oath, &c.

render the defence complete, would require to be proved at the hearing, the plea must be upon oath. Thus, where a defendant pleaded the Statute 32 Hen. 8, c. 9, against selling pretended titles, with the necessary averments of want of possession, &c., it was ordered to be taken off the file, because the plea, although it set out a Statute, was, in substance, matter *in pais* (*s*). For the same reason, pleas of a Statute of Limitations, or of any other Statute which requires averments to bring the defendant's case within their operation, must be upon oath. It seems, however, that a mere averment of identity will not render it necessary that a plea of matter of record should be put in upon oath; therefore, where a plea of the plaintiff's conviction for forgery was put in without oath, Lord Eldon held it sufficient, although there was an averment of the identity of the plaintiff (*t*); and so the circumstances of a plea of outlawry, containing such an averment, will not render it necessary that it should be upon oath (*u*).

A mere averment of identity will not render oath necessary.

It has been stated, that a plea of privilege of an University may be put in without oath, although it contains an averment that the defendant is a scholar resident, &c. (*x*). It is to be observed, however, that the only authority for this statement is to be found in the case above referred to, and that there the opinion appears to have been merely *an obiter dictum* of the Lord Keeper, the question not having been before the Court; and it is difficult to reconcile it with the rule of the Courts of Common Law with regard to claims of privilege, as laid down by Mr. Justice Blackstone in his Commentaries (*y*). The learned judge, in speaking of a claim of privilege on the part of the Universities, says, "In this case the charter, confirmed by act of parliament, directs the trial of the question, (whether a privileged person or no,) to be determined by the certificate and notification of the Chancellor under seal, *to which it hath also been usual to add an affidavit of the fact;* but if the parties be at issue between themselves, whether A. is a member of the University or no, on

Quære as to plea of privilege of a University.

(*s*) Wall v. Stubbs, 2 V. & B. 354.
(*t*) —— v. Davies, 19 Ves. 81.
(*u*) Ante, vol. 1, p. 62.
(*x*) Prat v. Taylor, 1 Cha. Ca. 237.
(*y*) 3 Bl. Com. 335.

Oath, &c.

a plea of privilege, the trial shall be then by jury, and not by the Chancellor's certificate; because the charters direct only that the privilege be allowed on the Chancellor's certificate when the claim of cognizance is made by him and not where the defendant himself pleads his privilege; so that this must be left to the ordinary course of determination.'

What is matter of record.

With respect to what may be termed matter of record, which may entitle a defendant to plead it without oath, it seems that it must be matter which has been properly enrolled or made a complete record in the Court out of which it comes. Records are complete for this purpose as soon as they are delivered into the Court in parchment, and there fixed as the rolls of the Court (z); but, before they are so fixed, and do not constitute a perfect record, they are said to be *as of record,* and although they may be sufficient in the Courts themselves to which they belong as ground for ulterior proceedings, they have not assumed that permanent form which gives them the character of records. Thus, a judgment at law, signed by the proper Officer of the Court by which it is made, is a sufficient foundation for the issue of execution by the same Court; but, as it is removable from place to place, it has not become a permanent record, and a copy of it will not, like copies of other records, be admissible as evidence in another Court (a). So, also, in the Court of Chancery, a Bill or other pleading, which has been duly filed, or even a decree, though passed and entered, is not a record of the Court, of which a copy can be admissible as evidence in another Court. A proceeding or decree, does not become a record till it has been signed and enrolled. When, therefore, it is said, that pleas of matters of record may be put in without oath, it must be understood as confined to those matters which are of record, strictly so speaking, and which require no other evidence to prove them than what the Courts are in the habit of recognizing upon inspection (b), such as exemplifications under the great seal of the Court of Chancery, or of the Court out of which it comes. Upon this principle it is that a decree of dismissal, signed and enrolled, may be pleaded without oath.

(z) 1 Phillips on Evidence, 387.

(a) Buller's N. P. 228.

(b) Vide Wall v. Stubbs, 2 V. & B. 354; —— v. Davies, 19 Ves. 81.

Oath, &c.

Upon the same principle, a plea of outlawry or of excommunication may be put in without oath, and so may a plea of conviction of felony (*c*).

What is matter *as of Record.*

With respect to matters not so recorded, they may be capable of proof *aliunde;* but, if pleaded, the plea must be accompanied by the oath of the party; unless, indeed, they consist of transactions in the Court itself, which, although they have not been solemnly and formally enrolled, are *quasi* of record. Pleas of such matters. as well as matters of record, may be put in without oath; for, as the Court is in the habit of noticing its own proceedings, they are capable of proof without any other evidence than the production of the proceeding itself, or an office-copy of it, signed by the proper officer. Upon this principle it is, that, when a plea of a suit already depending in the Court of Chancery is put in, the Court does not require that it should be upon oath, but immediately refers it to the Master to inquire into the existence of such a suit (*d*).

With reference to the subject of pleas of matter of record, it may be observed, that, in the case of a plea of outlawry of the plaintiff, it was formerly usual, as well at law as in equity, to annex to the plea a copy of the whole record of outlawry, duly authenticated by the seal of the Court from which it has issued, in order that the Court may judge immediately of the truth of the plea (*e*); but latterly it has been the practice to annex the *capias utlagatum* only, under the seal of the Court (*f*), or of the proper office, (which is, in fact, the seal of the Court;) and this appears to be now the rule in pleas of this description. And where, instead of a copy of the *capias utlagatum*, duly authenticated, the defendant annexed a certificate, under the seal of the Clerk of the Outlawries, the plea was held to be bad (*g*).

Where accompanied by answer.

It seems that, by the rules of practice, in all cases where a plea is accompanied by an answer, it must be put in upon

(*c*) —— v. Davis, ubi supra.

(*d*) Vide ante, p. 144.

(*e*) Co. Litt. 128, b.; Ld. R. 184.

(*f*) 4 Lutwyche, 6; 5 Bac. Ab. 235.

(*g*) Waters v. Mayhew, 1 S. & S. 220. Leave was, however, given to amend the plea, as the defect arose from the mistake of the Clerk of the Outlawries, (who is a public officer,) and not of the defendant.

Oath, &c.

oath. And, therefore, where an answer and plea were taken by commission, and the return was, 'This answer was taken upon oath,' so that the plea did not appear to have been upon oath, it was rejected, though without costs, as the Lord Keeper thought it might have been owing to an error of the Commissioners (*h*). It does not however, appear, from the report of the above case, whether the plea was of matter which might have been put in without oath or not.

A plea by a peer, or a person having privilege of peerage, must, in those cases where an oath would be required from persons not enjoying the privilege, be put in upon attestation of honour. In the case of a corporation aggregate, it must be under the common seal.

Omission of oath not an irregularity which can be waived.

It is to be observed, that where a plea, which ought to be upon oath, is put in without one, the irregularity is not one which can be waived by the plaintiff's taking any proceeding upon it, such as setting it down, &c. (*i*).

Sect. IV.

Of Filing, Entering, Setting down, and Arguing Pleas.

Of filing.

A plea, being drawn, or perused and settled by counsel, must be fairly engrossed upon parchment, the *jurat*, where the plea is upon oath or upon attestation of honour, being written at the top on the left side. Where there is no oath or attestation required, the *jurat*, of course, is omitted (*a*).

In a town cause.

The plea, being thus prepared, the Solicitor, when the defendant lives within twenty miles of London, produces him at the public office, where he swears to the truth of the plea before the Master attending the office; and the defendant ought to sign his Christian and surname at the foot of the plea, on the right side, in the presence of the master (*b*). If the defendant is sick, and unable to attend at the public

(*h*) Jefferson v. Dawson, 3 Cha. Ca. 208.

(*i*) Wall v. Stubbs, 2 V. & B. 354.

(*a*) Hind. 218.

(*b*) Ib. 219.

Filing.

office, the Master will, if he lives within four miles of Lincoln's Inn Hall, go to his place of abode to take his plea, for which an extra fee is paid (*c*). If the defendant lives above four miles from Lincoln's Inn, he may have a commission to take it (*d*).

The plea, being complete for filing, is left at the public office with the Master's Clerk, and the defendant's Solicitor gives notice to his Clerk in Court that the plea is sworn and left at the public office, whereupon the defendant's Clerk in Court goes to the public office, and takes it away to file. The clerk at the public office always makes a memorandum of the delivery of the plea to the Clerk in Court or his agent, who generally subscribes his name thereto (*e*).

Where not upon oath.

Where a plea is not put in upon oath, it may be carried by the Solicitor to the Clerk in Court for filing, without being left with the Clerk in the public office.

When taken upon commission.

Where a defendant resides above twenty miles from London, or in case of sickness and above four miles from Lincoln's Inn Hall, he will be entitled to a commission, or *dedimus protestatem*, to take his plea, answer, or demurrer, (not demurring alone;) the method of suing out and executing which, will be shewn in the next chapter (*f*). It need only be observed here, that where a plea does not require the sanction of an oath or attestation of honour, it should not be returned upon a commission; and that if it is, although it may be allowed, the defendant will not be entitled to his costs by reason of the plaintiff's needless trouble in executing such commission (*g*).

When the plea is taken by commission, the Commissioners either send or bring the Commission, duly executed, with the proper return and plea annexed to it, to the office. If a Commissioner has the carriage of it, it is taken from him without oath; but, if sent by another person, he must, (unless the plaintiff's Clerk in Court will dispense with his so doing,) swear that it has not been opened or altered since he received it; after which the defendant's Clerk in Court files it in the same manner that he does answers taken by commission (*h*).

It may be proper here to observe, that when the defendant is to be sworn to a plea and answer before Commissioners in

(*c*) Prac. Reg. 76.
(*d*) Post. chap. xiv, s. 3.
(*e*) Hind. 219.
(*f*) S. 3.
(*g*) Hind. 222.
(*h*) Ibid. 221.

Of filing.

the country, it ought to appear distinctly by the *caption* that the defendant was sworn to the plea as well as to the answer; otherwise the plea will be rejected (*g*); but the Court will sometimes permit the caption to be amended.

Not after attachment, with proclamation, returned. Unless with leave.

We have seen before, that no plea can be received after the *return* of an attachment with proclamations, unless with the special leave of the Court granted upon motion (*i*). Up to that point of process, a plea, whether accompanied by an answer or not, may be received; but, if filed after that time, it may be taken off the file upon motion (*k*). If, however, after an attachment with proclamations returned, a defendant succeeds in obtaining an order for time to *answer*, he may, under such order, put in any plea which requires the sanction of an oath, but not one which is not upon oath, such as a plea of outlawry, or of a former decree (*l*).

A plea is filed in the same manner as an answer (*m*).

Of entering.

'After a plea has been filed, the defendant must, (if the plea is grounded upon the substance or body of the matter, or extends to the jurisdiction of the Court,) enter it with the Registrar within eight days after filing; otherwise it will be overruled of course, as put in for delay; and the plaintiff may take out process to enforce the defendant to make a better answer, and to pay the costs. And the same shall not afterwards be admitted to be set down or debated, unless, upon motion, it shall be ordered by the Court' (*n*).

The above order, which requires a defendant to enter a plea within eight days after filing, applies only to such pleas as extend to the substance of the case or to the jurisdiction of the Court, which, by the same order, are directed to be argued in open Court; there are certain pleas, however, which are not

(*g*) Jefferson v. Dawson, 2 Cha. Ca. 208; For Rom. 94. Vide etiam Lloyd v. Gunter, 1 Vern. 275.

(*i*) Ante, vol. 1, pp. 608, 609.

(*k*) Ibid.; Sanders v. Murney, 1 S. & S. 225.

(*l*) Vide ante, vol. 1, ubi supra.

(*m*) Vide post, chap. xiv. s. 3.

(*n*) Beames's Ord. 173. Vide Jordan v. Sawkins, 3 Bro. C. C. 372.

Of entering.

heard in open Court, and, therefore, need not be entered by the defendant. These are pleas, 1. of outlawry; 2. of a former suit depending; and, 3. of a decree signed and enrolled. The first are pleaded, as we have seen, *sub sigillo*, so that their truth cannot be disputed. To the two latter species of pleas are, as has been stated, referred to the Master to inquire into, and certify the truth respecting them (*o*). It is, however, competent to the plaintiff, in case he thinks that a plea of any of the above three descriptions is defective, to set it down to be argued like other pleas; for which purpose he must himself enter the plea with the Registrar (*p*). In the instance of a plea of outlawry, the plaintiff, if he conceives that it is insufficient in form, must enter the plea within eight days after filing it; otherwise the defendant may take out process for costs (*q*).

Of setting down.

The plea having been entered with the Registrar, either side may obtain an order by petition, either to the Lord Chancellor or Master of the Rolls, (according to the Court in which the cause may be,) to set it down for argument (*qq*); such order must be brought to the Registrar at least two days before the day appointed for hearing (*r*). The proceedings with regard to setting down a plea for hearing, are, in all other respects, similar to those to be adopted in cases of demurrers (*rr*).

If a plaintiff, after obtaining an order to refer the plea for impertinence, sets the plea down for argument, his so doing will be a waiver of the impertinence, and the defendant may move to discharge the order of reference, even though the defendant has attended the Master upon the impertinence (*s*).

No proceeding in cause till plea has been argued.

It is to be observed, that, after a plea has been put in and entered, no step can be taken in the cause till it has been disposed of. Thus there can be no motion for an injunction till the plea has been argued. The Court will, however, at the instance of the plaintiff, in such a case, expedite the hearing of the plea, and will give the plaintiff leave to move on the same day that it comes on, if the plea should be overruled upon

(*o*) As to the method of procuring this reference, vide ante, p. 149, 178.

(*p*) Prac. Reg. 326, 330.

(*q*) Beames's Ord. 175.

(*qq*) For the method of obtaining such an order, vide ante, p. 83.

(*r*) Beames's Orders, 121.

(*rr*) Ante, p. 83.

(*s*) Dixon v. Olmius, 1 Cox, 412.

Setting down.

argument, that an injunction may issue(*t*). It is, however, to be noticed, that if, instead of overruling the plea, the Court allows it to stand for an answer, the defendant cannot move to dissolve the injunction absolutely, but only *nisi* (*u*).

So, also, if a defendant pleads to part, and answers to the residue of the Bill, the plaintiff cannot except to the answer till the plea has been argued (*x*), unless in cases where the plea is confined to the relief prayed, and the defendant professes to answer as to the whole discovery required; in such cases, it seems, the Court will not require the plaintiff to set down the plea before he excepts to the answer for insufficiency (*y*).

The rule which requires a plea to be disposed of upon argument, before any further proceedings are had in the cause, applies equally to cases where the defendant, as well as to cases where the plaintiff seeks to move in the cause. Thus where a plea has been filed and entered, the Bill cannot be dismissed for want of prosecution till the plea has been argued (*z*). And so if a defendant plead in bar, he cannot move for the plaintiff to make his election, till the plea has been argued; for the plea, by insisting that the plaintiff is not entitled to sue in equity, denies that he has an election (*a*); and if an order for the plaintiff to make his election has, under such circumstances, been made, the same will, on motion, be discharged (*b*).

Of replying to Plea.

It is not, however, necessary in all cases that a plea should be set down for argument; for, if the plaintiff conceives the plea to be good, though not true, he may reply to the plea, and take issue upon it, and proceed to examine witnesses, as in the case of an answer. In such case, the replying to the plea is always considered as full an admission of its validity as if it had been allowed upon argument (*c*); so that if the defendant, at the hearing, proves his plea to be true, the Bill must be dismissed (*d*); therefore, where a defendant, in a plea of purchase for a valua-

(*t*) Humphreys v. Humphreys, 3 P. Wms. 395.

(*u*) Osborn v. Cowper, Mos. 198.

(*x*) Darnell v. Reyny, 1 Vern. 344.

(*y*) Pigot v. Stace, 2 Dick. 496; Sidney v. Perry, ib. 602.

(*z*) Anon., Barnardist. 280; 1 Harr. 316, Newland's ed.

(*a*) Anon., Mos. 304.

(*b*) Vaughan v. Welsh, Mos. 210.

(*c*) Hind. 225.

(*d*) Ibid.

Setting down.

ble consideration, omitted to deny notice, and the plaintiff replied to it, and the defendant, at the hearing, proved the purchase for valuable consideration, it was held that the Bill ought to be dismissed; for it was the plaintiff's own fault that he had not set the plea down for argument, when it would have been overruled (*e*). And it seems, that in such case it will make no difference if the plaintiff should prove notice; for all that is required of a defendant in such a case is to prove his plea, which he does by proving the purchase and the payment of the consideration. Were it otherwise, the defendant might be tricked by the plaintiff, who, finding that the defendant had made a slip in his plea, might decline arguing it, and reply to it; in which case the defendant would be without remedy, for he could do no more than prove his plea (*f*).

Amendment of Bill before plea argued.

It has been before stated, that if the plaintiff after a plea has been put in, and before it has been argued, amends his Bill, it will be considered as an admission of the validity of the plea, as if the same had been allowed on argument. The rules of practice, with regard to amendments made after a plea has been put in, have been already pointed out, in treating of the amendment of Bills (*g*); it may, however, be added, that in *Spencer* v. *Bryan* (*h*) it was decided that if the plaintiff, after a plea has been filed, amends his Bill, thereby allowing the plea to be good, the defendant will be entitled to the same time to answer, as he would have upon an original Bill, the amended Bill in this case, standing in the place of a new Bill, the amendment being permitted only to save expense. That case, however, was before the new orders; whether the same practice would prevail now, has never yet been decided.

Of withdrawing plea.

If a defendant, after a plea has been set down, should wish not to argue it he may apply for liberty to withdraw his plea on payment of taxed costs (*i*), and where a plaintiff had set down a plea to be argued, and afterwards moved that it might not stand in the paper, and got an order to amend his Bill, it

(*e*) Harris v. Ingledew, 3 P. Wms. 94.
(*f*) Ibid.
(*g*) Vide, vol. 1, p. 524, and seq.
(*h*) 9 Ves. 231.
(*i*) 1 Smith, 234.

Setting down.

was held, that the defendant was entitled to taxed costs (*k*). Where, after a plea had been set down for hearing, the plaintiff obtained and served an order to amend his Bill, and when the plea came on to be heard did not appear, the plea was allowed with costs, the Lord Chancellor saying, that he much doubted whether an order to amend without more would strike the plea off the Record (*l*). Where a plea had been set down, but when it came on to be heard the plaintiff declined arguing it, stating his intention to amend his Bill, the Vice-Chancellor held that, by desiring to amend, the plaintiff admitted the validity of the plea, and that the plea must be allowed on payment of the usual costs. In such case the order must not be drawn up with the usual words prefixed, "Upon hearing and debate &c." (*m*).

Where defendant does not appear.

Where a defendant sets down a plea, and upon its being called on does not appear, the plea will, upon affidavit by the plaintiff of service upon him of the order to set it down, be overruled; but if no such affidavit is produced, the plea can only be struck out of the paper. The Court will not, however, restore it, unless an affidavit is made by the Solicitor, accounting for his not being prepared when the plea was called on (*n*).

Argument.

The proceedings upon the argument of a plea, are nearly the same, *mutatis mutandis*, as those upon the argument of a demurrer. It may in addition be observed, that if a plea is supported by an answer, upon the argument of the plea, the answer may be read to counterprove the plea, and if the defendant appears not to have sufficiently supported his plea by his answer, the plea must be overruled or ordered to stand for an answer only (*o*). And it is to be remarked, that where a defendant had answered to an original Bill, which was afterwards amended, whereupon the defendant put in a plea to the amended Bill, the plaintiff was permitted to read the answer to the original Bill, to counterprove the plea to the amended Bill (*p*).

(*k*) Jones v. Wattier, 4 Sim. 128.

(*l*) Jennings v. Pearce, 1 Ves. J. 447.

(*m*) Lopes v. De Tastet, 3 Mad. 183.

(*n*) Mazarredo v. Maitland, 2 Mad. 38.

(*o*) Lord Red. 245.

(*p*) Hildyard v. Cressy, 3 Atk. 304.

A plea upon argument, may be either allowed simply, or the benefit of it may be saved to the hearing, or it may be ordered to stand for answer, or it may be overruled. The consequence of each of such judgments will be considered in the ensuing sections.

Argument.

Sect. V.

Of allowing Pleas.

Of taking issue upon the plea.

If a plea is allowed simply, it is thereby determined to be a full bar to so much of the Bill as it covers, if the matter pleaded, with the averments necessary to support it, be true. If, therefore, a plea is allowed upon argument, or the plaintiff without argument thinks it, though good in form and substance, not true in point of fact, he may take issue upon it. and proceed to disprove the facts upon which it is endeavoured to be supported (*a*). This he does by filing a replication, and serving the defendant with a subpœna to rejoin, in the same manner that he would do if the defendant had simply put in an answer to the Bill in the usual way (*b*).

By filing replication.

After the plaintiff has replied to a plea, the validity of the plea can never be questioned, but only the truth of it according as it is proved by the defendant or disproved by the plaintiff (*c*), in fact nothing but the matters contained in the plea as to so much of the Bill as the plea covers, is in issue, between the parties (*d*). If, therefore, issue is thus taken upon the plea, the defendant must prove the facts which it suggests. If he fails in this proof, so that, at the hearing, the plea is held to be no bar, and the plea extends to the discovery sought by the Bill, the plaintiff is not to lose the benefit of that discovery, but the Court will order the defendant to be

Truth of plea must be proved by defendant.

If plea found untrue plaintiff may have a discovery from defendant.

(*a*) Lord Red. 244.

(*b*) Vide post, "Of Hearing."

(*c*) Parker v. Blythmore, Prec. in Ch. 58; Dunsauy v. Shaw, 5 Bro. P. C. 267.

(*d*) Lord Red. 244.

Replication to.

examined upon interrogatories to supply the defect (*e*). But, if the defendant proves the truth of the matter pleaded the suit, so far as the plea extends, is barred even though the plea is not good, either in point of form or substance (*f*).

Plaintiff may examine at large.

It is to be observed, that although when a plea has been replied to, the matter in issue is the truth of the plea only, which must be proved by the defendant, this will not prevent the plaintiff, if he chooses, from examining witnesses to prove the whole case made by his Bill; and where a Bill was filed by a plaintiff, who founded his claim as representative of A. S., and the defendant pleaded, that A. S. under whom the plaintiff claimed, was living, to which the plaintiff put in a general replication, and then went into a general examination to prove his case, upon a motion being made on the part of the defendant to suppress the plaintiff's depositions, Lord Bathurst, who was assisted by Sir T. Sewel, M. R., refused to make the order, although it was held, that if the plea should turn out to be true it would be impossible for the plaintiff to use them (*g*).

But not in general necessary so to do.

It can scarcely, however, be imagined, that a case should ever arise, in which such a course of proceeding. on the part of the plaintiff would be advisable, especially as the Court will not, as we have seen, in the event of the plea being found false, deprive the plaintiff of any advantage which he might have had from a discovery by the defendant if an answer had been originally put in.

In what cases plaintiff must go into evidence.

The plaintiff may, however, if he pleases, go into evidence to disprove the plea, and if he has in his Bill alleged any matter which, if true, may have the effect of avoiding the plea, such as notice, fraud, &c., he may, after replying to the plea, examine any witnesses, he may have in support of his allegation. And where the plea introduces matter of a negative nature, such as denial of notice, fraud, &c., it will be necessary for him, in case sufficient is not admitted by the answer in support of the plea, to shew the existence of the

(*e*) Ib.; Brownsword v. Edwards, 2 Ves. 247. Wood v. Strickland, 2 V. & B. 158.

(*f*) Lord Red. 244; Harris v. Ingledew, 3 P. Wms. 94.

(*g*) Ord v. Huddleston, 2 Dick. 510.

notice or fraud to go into evidence in support of the affirmation of the proposition (*g*).

Costs.

When a plea is allowed, it is considered as a full answer, and an injunction obtained, till answer, will be dissolved, upon application as a matter of course (*h*).

Costs.

By the New Orders of the 3d of April, 1828, Order 31, it is provided, that upon the allowance of any plea, the plaintiff shall pay to the defendant the taxed costs thereof, and when such plea is to the whole Bill, the taxed costs of the suit also, unless in case of a plea, the plaintiff or plaintiffs shall undertake to reply thereto, and then the costs shall be reserved, or unless the Court shall think fit to make other order to the contrary.

Previously to this order, the practice with regard to costs, upon allowing or overruling pleas, was regulated by an order of the 21st of July, 1710, by which the costs to be paid upon the allowing or overruling of any plea or demurrer was fixed at 5*l.* (*i*); and, by a further order of the 6th of February, 1794, by which, besides such sum of 5*l.* settled to be paid on allowing or overruling a plea or demurrer, (as also the 5*l.* deposit on the re-arguing a plea or demurrer,) the party was made liable in all such cases to such further costs as the Court should award (*k*).

It may be mentioned with reference to this subject, that where a plaintiff, after setting down a plea to be argued, moved that it might not be in the paper for hearing, and obtained an order to amend the Bill, he was ordered to pay the taxed costs under the 31st order above mentioned (*l*).

(*g*) Eyre v. Dolphin, 2 Ball and B. 303; Saunders v. Leslie, ib. 515.

(*h*) Philips v. Langhorn, 1 Dick. 148.

(*i*) Beames' Ord. 320.

(*k*) Ib. 456.

(*l*) Jones v. Wattier, 4 Sim. 128.

Sect. VI.

Of saving the Benefit of a Plea to the Hearing.

In what cases.

It sometimes happens that, upon the argument of a plea, the Court considers that although, so far as then appears, it may be a good defence, yet there may be matter disclosed in evidence, which, supposing the matter pleaded to be strictly true, would avoid it, in such case the Court, in order that it may not preclude the question by allowing the demurrer, directs that the benefit of it shall be saved to the defendant at the hearing (*a*). The effect of such an order is to give the plaintiff an opportunity of replying and going into evidence without overruling the plea (*b*).

When the benefit of the plea is reserved to the hearing, such part of the Bill as is covered by the plea is not to be answered (*c*).

Costs.

Unless any thing is said in the order in such cases, with respect to the costs of the plea, they must abide the result of the hearing, the order saving the benefit of the plea to the hearing, being in fact nothing more than an order for the adjournment of the discussion, Lord Ch. Baron Gilbert, with reference to this subject, observes, 'But if the words are to save the benefit of the plea till the hearing, no other use could ever be found by these words but that in truth it saves the defendant paying costs for the overruling his plea; and, therefore, though the Court often makes use of these words, yet when the plea is very faulty, or naught, that the Court often saves the benefit thereof till the hearing, yet they declare it shall not avoid the payment of costs' (*d*).

(*a*) Lord Red. 245.
(*b*) Vide Cooth v. Jackson, 6 Ves. 12, 18.
(*c*) For. Rom. 64.
(*d*) Ib. 94.

Sect. VII.

Of Ordering a Plea to stand for Answer.

In what cases.

If upon argument, the Court considers that the matter offered by way of plea may be a defence, or part of a defence, but that it has been informally pleaded, or is not properly supported by the answer, so that the truth is doubtful, it will, in such case, instead of overruling the plea, direct it to stand for an answer (*a*).

Effect of.

If a plea is ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the Bill as it covers, unless by the order liberty is given to the plaintiff to except (*b*); and where a defendant pleaded to the whole Bill, and, on arguing the plea, it was ordered to stand for an answer, without saying, one way or the other, whether the plaintiff might except, the plaintiff was not allowed to except, because, by the terms 'for an answer,' in the order, a sufficient answer is meant, an insufficient answer being no answer (*c*). It is to be observed, that if a plea be to part only of the Bill, and is accompanied by an answer to the rest, an order that it may stand for an answer, without giving the plaintiff liberty to except, will not preclude the plaintiff from excepting to the answer to that part of the Bill which is not covered by the plea (*d*).

Where no liberty given to except.

Where plea is to part only.

Where liberty is given to except.

The order for the plea to stand for an answer, is, however, frequently accompanied with a direction that the plaintiff shall be at liberty to except; but the liberty is sometimes qualified so as to protect the defendant from any particular discovery, which he ought not to be called upon to make (*e*).

When a plea has been ordered to stand for an answer, with liberty to except, the plaintiff must proceed to deliver his exceptions within two months, otherwise the answer will be de-

(*a*) Lord Red. 245.

(*b*) Ibid.

(*c*) Sellon v. Lewen, 3 P. Wm. 239.

(*d*) Coke v. Wilcocks, Mos. 73; Ld. Red. 246.

(*e*) Lord Red. 246; Alardes v. Campbel, Bunb. 265; Brereton v. Gamul, 2 Atk. 240; Pusey v. Desbouvrie, 3 P. Wm. 315; King v. Holcombe, 4 Bro. C. C. 439; Bayley v. Adams, 6 Ves. 586.

Liberty to except.

creed sufficient (*f*). The proceedings upon the exceptions when delivered, will be the same as those upon exceptions to answers in general.

When a plea is ordered to stand for an answer, the plaintiff is entitled to the usual costs of overruling a plea (*g*).

Sect. VIII.

Of overruling Pleas.

In what cases.

If the Court, upon argument, is of opinion that the plea cannot, under any circumstances, be made use of as a defence, it is simply overruled, and the plaintiff may proceed to have his costs taxed, and to issue process for the recovery of them; he may also, if the plea has been to the whole Bill, and the defendant's time for answering has expired, issue an attachment for want of an answer (*a*), unless the defendant has obtained either from a Master, or from the Court at the hearing (*b*), an extension of time to answer: in such case the attachment must not be issued till the extended time for answering has expired.

New defence.

The effect of overruling a plea, is to impose upon the defendant the necessity of making a new defence. This he may do, either by a new plea, or by an answer, and the proceedings upon the new defence will be the same as if it had been originally made.

It is said, in some of the books of practice, that after a plea has been overruled a new defence may be made by demurrer; and, in *The East India Company* v. *Campbell* (*c*), such a demurrer (which was upon the ground that the discovery would subject the defendant to pains and penalties,) was permitted. It is to be recollected, however, that this occurred under the

(*f*) Ord. 1828, IV.
(*g*) Howling v. Butler, 2 Mad. 245.
(*a*) Hind. 224.
(*b*) Waterton v. Croft, 6 Sim. 438, ante.
(*c*) 1 Ves. 246.

old practice, under which, provided a defendant was not in contempt or had not obtained an order for time, he might have put in a demurrer at any time; but, under the new orders, this would be nearly impossible, unless by special leave of the Court; since, by the 10th order (*d*), twelve days only, from appearance, are allowed to a defendant to demur alone to any Bill. A demurrer to part of the Bill may, however, still be put in, in cases where the whole time allowed by the above order to plead, answer, or demur, (not demurring alone,) has not elapsed at the time of the plea being overruled, or where an order for additional time for the same purpose has been obtained. But under an order for time to answer alone, such a defence cannot, it is apprehended, be put in.

New defence.

By partial demurrer.

We have seen before, that after a plea has been overruled a defendant cannot demur *ore tenus* (*e*).

By second plea.

The rule with regard to pleading again, must be understood with this qualification, viz., that the second plea must not be upon the same ground as the first; therefore, it is held that only one plea to the jurisdiction can be allowed (*f*). And so where, to a Bill to set aside an agreement and release, stating circumstances of fraud and duress, the defendant pleaded the agreement and release to the whole Bill, without denying the fraud and duress, and the plea was, upon that ground, overruled; whereupon the defendant put in another plea, insisting upon the same release as a bar to the relief, and also to so much of the discovery as related to transactions prior to the agreement, accompanied by an answer as to the circumstances of fraud and duress, this was held to be irregular (*g*).

Exceptions to answer.

If the plea has been to part of the Bill only, accompanied by an answer to the rest, the plaintiff may proceed to compel an answer to the part intended to be covered by the plea, by

(*d*) Ord. 1833, X.

(*e*) Ante, p. 87.

(*f*) Prac. Reg. 325. It is said, in the same work, p. 330, that if outlawry or other matter be pleaded, and the plea is overruled, no other plea shall be after pleaded; but the defendant must answer. This, however, must be meant to apply to other pleas of the *same matter*. Sed vide Rowley v. Eccles, 1 S. & S. 511, where Sir J. Leach, V.C., appears to have held, that after a plea is overruled, a defendant cannot put in a second plea without leave of the Court

(*g*) Freeland v. Johnson, 2 Anst. 407.

Exceptions. exceptions to the answer. It is said, also, that he may serve him with a subpœna for a better answer, but that he cannot do both (*h*).

Plea by a defendant to a Bill of revivor. It is to be observed, that a defendant to a Bill of revivor cannot plead, to the original Bill, a plea which has been pleaded by the original defendant, and overruled (*i*); but if a plea has been put in, and the original defendant has died before argument, the defendant to the Bill of revivor may plead the same matter *de novo*.

Costs. By Lord Lyndhurst's orders, it is directed that upon the overruling of any plea, the defendant or defendants shall pay to the plaintiff or plaintiffs the taxed costs occasioned thereby unless the Court shall make other order to the contrary (*k*).

Sect. IX.

Of amending Pleas, and pleading de novo.

In what cases allowed. It sometimes happens, that where there is evidently a material ground of defence disclosed in the plea, but, owing to some evident slip or mistake, the plea has not been correctly framed, the Court, in this respect following the Courts of Law, will exercise a discretion in allowing the plea to be amended (*a*). Thus where a plea, which in substance shewed a defect of parties, instead of stating that additional parties were necessary and naming them, prayed judgment whether the defendant ought to be called upon for further answer, Lord Eldon, upon the argument, instead of overruling the plea, on the ground of informality, gave the defendant leave to amend it (*b*). And so where an error in a plea of outlawry was occasioned by the Clerk of the Outlawries, who, instead of a copy of the record of the out-

(*h*) Strickland v. Mackenzie, 1 Dick. 49.

(*i*) Samuda v. Furtado, 3 Bro. C. C. 70.

(*k*) Ord. 3 April, 1828, 31.

(*a*) Beames on Pleas, 321.

(*b*) Merreweather v. Mellish, 13 Ves. 437.

lawry, or of the *capias utlagatum*, gave a certificate of the outlawry, which was annexed to the plea, the Court allowed the defendant to amend his plea, by annexing to it a copy of the *exigent*, or record of the outlawry (*c*). And so where the Court of Exchequer thought that the negative averments in a plea were too special and precise, the same matter being also denied by the answer in support of the plea, they gave the defendant leave to amend his plea by striking out the special averments (*d*).

Amendment.

Pleading *de novo.*

It has also happened that where a plea has offered a substantial defence, but has been so informally pleaded that it would be difficult or impossible to amend it, the Court, instead of allowing the defendant to amend his plea, has given him leave to withdraw it altogether, and plead *de novo* (*e*).

No liberty to amend, where substantial ground of defence omitted.

Liberty to amend, or to plead *de novo*, however, will only be granted in cases where there is an apparent good ground of defence disclosed by the plea but owing to some accident or mistake, it has been informally pleaded; where a substantial ground of defence has been omitted, such permission will not be given. Thus, in *Freeland* v. *Johnson*, before referred to (*f*), where the Bill sought to set aside an agreement and release, stating circumstances of imposition and equitable *duress* in obtaining them, and the defendant put in a plea of the agreement and release to the whole Bill, without denying the fraud or *duress*, either by averments or by answer, the Court of Exchequer refused to give defendant leave to amend.

Leave to amend in what manner obtained.

But although, where the error is very palpable, the Court will give the defendant leave to amend at the argument of the plea, the most usual course is for the defendant to make a subsequent motion for leave to amend his plea. This form of proceeding is rendered necessary by the circumstance that the Court always requires to be told precisely what the amendment is to be, and how the slip happened, before it will allow

(*c*) Waters v. Mayhew, 1 S. & S. 220.

(*d*) Pope v. Bish, 1 Anst. 59. Sed, vide ante.

(*e*) Nobkissen v. Hastings, 2 Ves. jun. 84, 4 Bro. C. C. 252, S. C.; Watkins v. Stone, 2 S. & S. 560.

(*f*) Ante, p. 229. 1 Anst. 276. Vide S. C. 2 Anst. 407.

Amendment.

the amendment to take place; and this must, in general, be done by affidavit in support of the motion (*g*). In *The Nabob of Arcot* v. *The East India Company* (*h*), Lord Thurlow refused to entertain the question, whether the plea might be amended or not upon the argument, because no motion had been made on the subject; and he said that he should expect that whenever such a motion should be made, the form of the plea intended to be put in should be laid before the Court; for amendments, when moved, ought to be stated, that the Court may see whether it is material that the cause shall be delayed for the purpose of admitting them.

Not granted after plea has been once amended.

It is to be remarked, that at a subsequent period, (after the plea in the above case had been overruled,) the defendants applied by motion for leave to amend the plea, or to plead anew, but that the Lord Chancellor refused the motion on the ground, as appears from the marginal note of one of the reporters, that the plea had been amended before (*i*).

(*g*) Newman v. Wallis, 2 Bro. C. C. 147; Prac. Reg. 340; Wood v. Strickland, 2 V. & B. 150, 157; Jackson v. Rowe, 4 Russ. 524.

(*h*) 3 Bro. C. C. 292, 300; 1 Ves. jun. 371.

(*i*) 1 Ves. jun. 372.

CHAP. XIV.

Of Disclaimers.

Nature of a disclaimer.

A Disclaimer is where a defendant, upon oath denies that he has or claims any right to the thing in demand by the plaintiff's Bill, and disclaims, *i. e.* renounces all claim thereto.

In what cases proper.

It has been before stated, that where a person who has no interest in the subject-matter of the suit, and against whom no relief is prayed, is made a party, the proper course for him to adopt, if he wishes to avoid the discovery, is to *demur*, unless the Bill states that he has or claims an interest, in which case as a demurrer, which admits the allegations in the Bill to be true, will not of course hold, he can only, except in cases of partial discovery, (to which, as will be presently shewn, he may object by answer,) avoid putting in a full answer by plea or disclaimer (*a*).

Must in general be accompanied by an answer.

A disclaimer, however, cannot often be put in alone; for although if a plaintiff, from a mistake, makes a person a party to a suit who is in no way interested in or liable to be sued, touching the matters in question, a simple disclaimer by such person might be good; yet, as it is possible that the defendant may have had an interest which he may have parted with, the plaintiff has a right to require an answer sufficient to ascertain whether that is the fact or not; and if a defendant has had an interest which he has parted with, an answer may also be necessary to enable the plaintiff to make the proper party instead of the defendant (*b*).

Defendant cannot disclaim a liability.

It is also a rule, that a defendant cannot shelter himself from answering, by alleging that he has no interest in the matter of the suit, in cases where, though he may have no

(*a*) Ante, vol. 1, p. 397.

(*b*) Lord Red. 257; Oxenham v. Esdaile, M'Lel. & Younge, 540.

When accompanied by answer.

interest, others may have an interest in it against him—he cannot disclaim his liability; therefore, it has been held that a party to an account cannot, by disclaiming an interest in the account, protect himself, by such disclaimer, from setting out the accounts (*c*). So, if fraud be charged against the defendant seeking to disclaim, a disclaimer alone is insufficient, and an answer must be given to the imputed fraud. Thus, where a Bill stated that the agent in London for the plaintiffs having received bills from them, to be by him endorsed to their account as required, had by menaces been compelled to endorse them to the defendants for a debt of his own, and prayed a discovery, and that the notes might be delivered up, &c., and one of the defendants put in an answer and disclaimer, alleging that he had only acted as agent for the other defendant, and disclaiming any interest in the notes, the Court of Exchequer, upon exceptions being taken to the answer, held, that when an agent commits a fraud, he is answerable as principal to the person injured, and that, as there was a direct charge of fraud in the Bill, the defendant, although an agent, was bound to answer (*d*).

— or prejudice the plaintiff's right against others.

It is to be observed also, that a disclaimer by one defendant cannot, in any case, be permitted to prejudice the plaintiff's right as against the others. And, therefore, where a Bill was filed against the lessees of tithes, under a parol demise, for an account, &c., and the lessor was made a party defendant, who disclaimed; the disclaimer of the lessor was not permitted to prejudice the rights of the plaintiff against the lessees, and a decree was made against them, although the plaintiff had, upon the disclaimer coming in, himself dismissed the Bill against the lessor with costs (*e*).

Form of.

Though a disclaimer is, in substance, distinct from an answer, yet it is, in point of form, an answer, and is preceded and concluded by the same formal words, and it is put in and filed in the same way (*f*). It contains simply an assertion

(*c*) Glassington v. Thwaites, 2 Russ. 458.

(*d*) Bulkeley v. Dunbar, 1 Anst. 37.

(*e*) Williams v. Jones, 1 Younge, 252.

(*f*) Hind. 209. Vide post, Chap. XV.

that the defendant disclaims all right and title to the matter in demand. Lord Redesdale observes, that in some instances, from the nature of the case, this may perhaps be sufficient, but that the forms given in the books of practice are all of an answer and disclaimer (*g*).

Form of.

If a defendant puts in a disclaimer where he ought to answer, or accompanies his disclaimer by an answer which is considered insufficient, the plaintiff may take the opinion of the Court upon its sufficiency, by taking exceptions to it in the same manner as to an answer (*h*). It seems, also, that if a defendant, under pretence of putting in a disclaimer and answer, puts in a mere disclaimer, without any answer, such a proceeding will be considered evasive, and the pretended disclaimer and answer will be taken off the file (*i*). If, however, instead of applying in the first instance to the Court by motion, to take the disclaimer off the file, the plaintiff delivers exceptions, he will be precluded from afterwards moving for that purpose (*k*).

Of exceptions to.

Where a defendant puts in a general disclaimer to the whole Bill, the plaintiff ought not to reply to it. If he does so, and serves the defendant with a subpœna to rejoin, the defendant will be entitled to have his costs taxed against the plaintiff for vexation (*l*). It is otherwise, however, where the disclaimer is to part, and there is an answer or plea to another part of the same Bill, in such cases there may be a replication to such plea or answer (*m*).

Proceedings upon.

The course to be pursued by the plaintiff, after a disclaimer to the whole Bill has been filed, is either to dismiss the Bill as against the party disclaiming with costs, or to amend it. He may also set the cause down upon the disclaimer, and serve a subpœna to hear judgment, in which case, if he can satisfy the Court that he had probable cause or reason to exhibit his Bill against such defendant, he may, if he pleases, pray a decree

— on the part of plaintiff.

(*g*) Lord Red. 257.

(*h*) Glassington v. Thwaites, 2 Russ. 458; Bulkeley v. Dunbar, 1 Anst. 37.

(*i*) Glassington v. Thwaites, ubi supra.

(*k*) Ibid.

(*l*) Williams Longfellow, 3 Atk. 582.

(*m*) Ibid. Curs. Canc. 209.

Proceedings on. against such defendant, and all claiming under him, and such decree is commonly granted without costs on either side (*n*). If, however, it should appear that the defendant was made a party vexatiously, *i. e.* without probable cause or reason, the plaintiff will be ordered to pay him his costs (*o*).

— on the part of the defendant.

It seems, however, that the defendant is not bound to wait for his costs till the hearing of the cause; he may, if he thinks that he has been vexatiously made a defendant, apply for his costs by motion, as soon as the plaintiff's time for amending his Bill has expired; such motion, however, must be made upon notice (*p*); and it is presumed that if the plaintiff can succeed in satisfying the Court that he had just ground for making the defendant a party, the defendant will take nothing by his motion.

Defendant ordered to pay the whole costs of the suit.

In a recent case, where a defendant had occasioned the suit in consequence of a claim to the fund set up by himself, which he refused to release or to verify, and afterwards put in a disclaimer, stating in his answer the facts upon which he had supposed himself to be entitled, as a ground for his not being ordered to pay the costs of the suit, which were prayed against him, in consequence of which the plaintiff examined a great number of witnesses to falsify such statement, but no witnesses were examined by the defendant, the Vice-Chancellor ordered him to pay the whole costs of the suit, as well the plaintiff's costs, as the costs which the plaintiff was ordered to pay to the co-defendants (*q*).

Defendant disclaiming may be examined as a witness,

If one be made a defendant in a Bill, among other material defendants, who in nowise pretends to any right to the matter in question, and he thereupon disclaims, he may, after such disclaimer, upon motion for that purpose, be examined as a witness in the cause on behalf of the other defendants; for it shall be presumed his name was inserted in the Bill, without other cause than to take away his testimony from the other defendants (*r*). This, however, must apply only to cases

— on the part of co-defendants.

(*n*) Prac. Reg. 175.
(*o*) Hind. 209.
(*p*) Ibid.
(*q*) Deacon v. Deacon, 7 Sim. 378.
(*r*) Curs. Canc. 133; Hind, 209; Seton v. Slade, 7 Ves. 265-7.

where his evidence is required by the co-defendants; for it has been held, that where a title has been set up to an estate, and you make a person a defendant who disclaims all right, and you do not bring him to hearing, you cannot read his evidence in support of your own right, to the prejudice of another defendant (*s*). In such a case the plaintiff, if he wishes for the evidence of the party disclaiming, should amend his Bill by striking out his name as a defendant, or move to dismiss it as against him.

Proceedings on. — but not on behalf of plaintiff.

It is to be remarked, that a defendant cannot, by answer, claim what, by his disclaimer, he admits he has no right to (*t*); and that if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer (*u*). But if a defendant puts in a disclaimer, and afterwards discovers that he had an interest, which he was not apprized of at the time he disclaimed, the Court will, upon the ground of ignorance or mistake, permit him to make his claim. It will not, however, allow a defendant to do so at the hearing of the cause: he must, in order to get rid of the effect of his disclaimer, make a distinct application, supported by affidavits, setting forth the facts in detail on which he founds his claim to such an indulgence (*x*); and it seems that the Court will expect a strong case to be made out before it will grant the application (*y*).

Defendant cannot claim by his answer what he has disclaimed.

Of withdrawing a disclaimer.

(*s*) Hill v. Adams, 2 Atk. 39.
(*t*) Lord Red. 258.
(*u*) Ibid.
(*x*) Sidden v. Lediard, 1 R. & M. 110.
(*y*) Seton v. Slade, 7 Ves. 265-7.

CHAP. XV.

Of Answers.

Sect. 1.—*General Nature of Answers.*

In what cases proper.

In what cases defendant must answer.

If a defendant can neither protect himself by demurrer or plea, from answering the plaintiff's Bill, nor disclaim all right and interest in the subject of the suit, he must put in an answer, either to the whole Bill, or to such parts of it, as are not covered by his demurrer or plea.

Different in practice in the Civil Law Courts as to,

By the civil law, when the plaintiff had put in his positions before the judge, the defendant was to put in his contestations or negations of such positions, and the plaintiff had liberty to examine the defendant upon interrogatories to supersede the necessity of proof, and these were called the *libellus articulatus*, or *articles of the libel*, and were generally put in after the first act, when the defendant had answered the positions (*a*). In Courts of Equity, however, the positions and the articles are thrown together into one Bill, which not only prays that the defendant may answer the matters or positions contained in the Bill, but goes on, as we have seen, to add a series of interrogatories, founded upon the contents of the Bill, and adding to the inquiry, after each fact, an inquiry into the circumstances attendant upon it, and the variations to which it may be subject, with a view to prevent evasion and to compel a full answer (*b*).

Old practice in Court of Chancery.

It seems, that at first, the Masters of the Court, when the defendants were in London, examined them upon these interrogatories. In country causes, this duty was left to Commissioners in the country; and, for this purpose, they sent to the Commissioners a copy of the Bill, which they called the *tenor* thereof, that they might examine the defendant upon the *libellus articulatus*, or articles,

(*a*) For. Rom. 90.

(*b*) Ante, vol. 1, p. 487.

as the Masters were wont to examine the defendants in town upon the articles of the Bill itself (*c*). But afterwards the Master left the examination of the defendants to the Counsel, who drew the answer, as the Court had left the perusal of the Bill to Counsel; (for anciently the Court perused the Bill itself, to see whether the petition was proper before it was filed; but the Court, by reason of the increase and multiplicity of business, left the perusal of the Bill to the honour of the bar (*d*):) and this continues to be the practice to the present day; and in almost all cases, answers are settled, if not prepared, by Counsel.

In what cases proper.

It is to be observed, that besides furnishing the result of an examination of the defendant upon the articles or allegations of the Bill, the answer has generally another part to perform, namely, that of stating to the Court the nature of the defence upon which the defendant means to rely. In this respect, the answer fulfils the duties of a plea, or of a series of pleas, either denying facts upon which the plaintiff's equity, as stated in the Bill, arises; or confessing such facts and avoiding them by the introduction of some new matter from which contrary inferences may be drawn.

Twofold nature of answers.

In this twofold nature of an answer, pleadings in equity are distinguished from all other systems of pleading; and even from those that are formed on the same model in the Civil and Ecclesiastical Courts, from which the proceedings in Chancery are principally derived; the answer which the defendant is required to make upon oath to the allegation and articles, being in those Courts a wholly distinct instrument from the *responsive allegation* which contains the defence (*e*).

But although an answer has, in general, the twofold property above stated, it is seldom possible, in framing one, to keep the parts separate from each other, though when it is practicable to do so, such a course is generally desirable. It is, however, of great importance to the pleader in preparing an answer, to bear in mind that besides answering the plaintiff's case as made by the Bill, he has to state to the Court upon the

Statement of defendant's case.

Defendant must state his whole case upon the answer.

(*c*) For. Rom. 90; Hind. 230; vide Brown v. Bruce, 2 Mer. 1.

(*d*) For. Rom. 91.

(*e*) Hare on Discovery, 223.

Statement of defendant's case.

answer, all the circumstances of which the defendant intends to avail himself by way of defence; for it is a rule, that a defendant is bound to apprize a plaintiff by his answer, of the nature of the case he intends to set up (and that too, in a clear unambiguous manner;) and that a defendant cannot avail himself of any matter in defence, which is not stated in his answer, even though it should appear in his evidence (*f*).

Plaintiff has a right to be informed, not only of all the facts to be proved, but of the use to be made of them.

It is to be remarked, that the right of the plaintiff to be informed by the defendant's answer, of the nature of the defence to be set up, is not confined to the points as to which the defendant intends to produce evidence; but the plaintiff has a right, even when the facts are uncontroverted, to have notice upon the record in a precise and unambiguous manner, of the nature of the conclusions intended to be drawn from them. Upon this ground, where the defendants, in a tithe suit, insisted by their answer, that they could not be affected by a notice to determine a composition, which had been stated in the Bill, they were not permitted to rely, at the hearing, upon the insufficiency of the notice; the Court of Exchequer being of opinion, that the expression in the answer was too equivocal to be considered as a sufficiently clear intimation to the plaintiff, that the defendants intended to rely on the insufficiency of the notice (*g*).

Defendant cannot make use of the same facts for a different purpose to what he has stated.

It must not be inferred, however, from the above case, that a defendant is bound to state, upon his answer, the conclusions in law which he intends to deduce from the facts he has set out; that, as has been before stated, would be contrary to the principles of good pleading; indeed, the most correct method of pleading is, merely to state the facts intended to be proved, and to leave the inference of law to be drawn from them upon the argument of the case; but what the case of *Bennett* v. *Reade* establishes, is, that if you state upon your answer certain facts as evidence of a particular case, which you represent to be the consequence of those facts, and upon which you

(*f*) Stanley v. Robinson, 1 R. & M. 527; sed. vide Hodgson v. Thornton, 1 Eq. Ca. Ab. 228.

(*g*) Bennett v. Neale, Wightw. 324.

rest your defence, you shall not be permitted afterwards to make use of the same facts, for the purpose of establishing a different defence from that to which, by your answer, you have drawn the plaintiff's attention.

Statement of defendant's case.

Defendant may set up several defences by his answer, provided they are not inconsistent.

A defendant may, however, by his answer, set up any number of defences, as the consequence of the same state of facts, which his case will allow, or the ingenuity of his Legal Advisers may suggest; thus, in setting up an immemorial payment in lieu of tithes, a defendant has been allowed to rely upon it either as a *modus*, or as a composition real existing from time immemorial, or as a composition undetermined by notice (*h*). In none of these cases were any facts stated in the answers, which were inconsistent with any of the defences set up, and the evidence to prove them was, in either case, the same. In the latter case, certainly, the circumstance of no notice having been given to determine the composition, was a fact which would not have been necessary, if the defendant had succeeded in establishing the payment as a modus; but it was in no respect inconsistent with the other facts stated in the answer.

What defences are inconsistent.

But although a defendant may be permitted to set up, by his answer, several defences as the consequence of the same state of facts, or of facts which are consistent with each other, a defendant cannot insist upon two defences which are inconsistent with each other, or are the consequence of inconsistent facts. And in the application of this rule, it makes no difference whether the inconsistent defences are each substantially relied upon, or are set up in the alternative; 'that answer is bad which either contains inconsistent defences, or an alternative of inconsistent defences' (*i*). Thus, although a defendant in a tithe suit might, by his answer, have set up a payment in lieu of tithes, either as a modus, or as a composition undetermined by notice; he could not have set up the same payment as a modus or composition in lieu 'either of the tithes of lambs, or (in the alternative) of the tithes of lambs and

Alternative defences.

(*h*) Atkyns v. Lord Willoughby De Brooke, 2 Anst. 397; Atkins v. Hatton, ib. 386; Woolley v. Brownhill, M'Lel. 317; Bishop v. Chichester, 4 Gwill. 1329.

(*i*) Jesus College v. Gibbs, 1 Younge & Coll. 145.

Statement of defendant's case.

something else'(*k*). So although he might set up a payment, either as a modus, or as a composition real existing from time immemorial, he could not set up the same payment either as a modus or as composition real not alleged to be immemorial. This question was much discussed in *Jesus College* v. *Gibbs* (*l*), in which the defendants set up, by their answer, certain yearly payments as moduses, but insisted that, 'if the same for any reason were not good and valid moduses from time immemorial, they must be taken to have been payable as a good and valid real composition, made with the assent of all parties whose assent was necessary thereto, before the restraining of the 13 Eliz.'; and the Court of Exchequer held, that this alternative was inadmissible, and that the plaintiffs were entitled to a decree. The principles upon which the above decisions are founded, are very clearly and accurately defined and extracted from the cases in the learned and able judgment of Mr. Baron Alderson in the above case; and although the question arose in a suit concerning tithes, yet as they are equally applicable to pleadings in all descriptions of suits, the writer thinks that he cannot better illustrate them, than in the learned Baron's own words. 'The plaintiffs contend (he observes,) that, on the pleadings as at present framed, they are entitled to a decree, inasmuch as the defence set up by the answer is wholly ambiguous, and calculated to mislead them; and, consequently, that I ought not to allow the defendants to go into proofs to establish either branch of the defence. On this point numerous cases have been cited, and I have had considerable difficulty in coming to a conclusion upon them. I think, when we advert to the course of proceedings in a Court of Equity, that some restriction of this kind seems well founded in principle. The fact, that a defendant is obliged to swear to the truth of his answer, would of itself, necessarily exclude inconsistent statements; for how could a defendant be permitted to attest, by his oath, the truth of two statements wholly irreconcileable with each other? But, although this would be impossible to be permitted, on account of the perjury which would thereby be introduced, it would not necessarily follow from thence that an alternative

(*k*) Leech v. Bailey, 6 Price, 504. (*l*) 1 Younge & Coll. 145.

statement might not be allowed; for a party might swear truly enough, that the fact was either in one or the other of two ways. The difficulty, however, would be, that then there is in truth no answer at all upon oath; for no one can affirm that the defendant means to swear really to his belief, as to either the one or the other of the two branches of the alternative. I think, therefore, that, upon principle, such an answer must be bad; for a statement of two or more inconsistent propositions in the alternative, is only a mode of making two inconsistent statements upon oath, without incurring the guilt or running the risk of perjury. Besides, if two inconsistent statements are to be thus allowed, being put as branches of one alternative proposition, it is impossible not to see that any number would fall within the same rule; and the whole advantage, if there be any, of a statement on oath by the defendant's answer to the plaintiff's Bill, would be lost, by a most obvious evasion, under the authority of the Court. Unless, therefore, some clear and distinct decision of a Court of Equity could be produced, establishing the propriety of such an alternative statement in an answer, I should be disposed to decide against it' (*m*).

Statement of defendant's case.

If defendant sets up inconsistent defences, plaintiff will be entitled to a decree.

From the above cases of *Jesus College* v. *Gibbs* and *Leech* v. *Bailey*, it is to be collected, that where a defendant sets up by his answer two inconsistent defences, the result will be to deprive him of the benefit of either, and to entitle the plaintiff to a decree (*n*). Sometimes, indeed, the Court will, where, from redundant expression or other verbal inaccuracy, a defence has been rendered inconsistent, where it was evidently not intended to be so, either reject the redundant expressions as surplusage (*o*), or direct them to be struck out (*p*); such indulgence, however, is confined to cases of verbal inaccuracy only, which would not have embarrassed the plaintiff in the conduct of his case.

In what cases defendant will be permitted to amend.

(*m*) Jesus College v. Gibbs, ubi supra.

(*n*) Sed vide, Nagle v. Edwards, 3 Anst. 702, and the observations upon that case in Jesus College v. Gibbs, ubi supra.

(*o*) Ellis v. Saul, 1 Anst. 332; Jenkinson v Royston, 5 Price, 495; vide etiam Uhthoff v. Lord Huntingfield, 1 Price, 237.

(*p*) Jesus College v. Gibbs, ubi supra.

Statement of defendant's case.

A denial of plaintiff's general right not inconsistent with a particular defence.

But although a defendant cannot, by his answer, set up in opposition to the plaintiff's title, two inconsistent defences in the alternative, he will not be precluded from denying the plaintiff's general title; and also insisting, that in case the plaintiff establishes his title, he is precluded from recovering by some other circumstance which would equally serve to preclude him or any other person in whom the title might be actually vested. Thus, in a tithe suit, the defendant might have denied the plaintiff's title as Rector or Vicar, and at the same time have set up a modus (*q*). 'So at law, if the plaintiff declares and the defendant pleads any thing in bar which, by presumption, admits the demand whereupon the plaintiff demurs, and the Court holds the plea bad, yet they will still see whether the plaintiff, in his declaration, has made a case sufficient to entitle him to recover' (*r*). In fact, there is nothing whatever inconsistent in such a proceeding; for by denying the plaintiff's title, the defendant merely puts the plaintiff to prove his own case, to shew his *primâ facie* right, which he may have independently of the question, whether a defendant may not establish a special case which may be equally valid against another, supposing such other to have the *primâ facie* title, as it would be against the plaintiff in case he proves his *primâ facie* title (*s*).

Of the certainty required in stating defendant's case.

It is to be observed, with reference to this part of an answer, that although in stating a defendant's case, it is necessary to use such a degree of certainty as will inform the plaintiff of the nature of the case to be made against him; it is not requisite that the same degree of accuracy should be observed in an answer as is required in a Bill. This proposition is strongly illustrated by what has been formerly stated upon the subject of stating a modus applicable to a particular portion of lands in a parish (*t*).

Of insisting upon the same benefit as if defendant had pleaded or demurred.

It may be mentioned also in this place, that if the defence which can be made to a Bill, consists of a variety of circumstances, so that it is not proper to be offered by way of plea,

(*q*) Carte v. Ba , 3 Atk. 496, 499.

(*r*) Ibid.

(*s*) Jesus College v. Gibbs, ubi supra.

(*t*) Ante, vol. 1, 479.

Statement of defendant's case.

or if it is doubtful whether a plea will hold, the defendant may set forth the whole by way of answer, and pray the same benefit of so much as goes in bar as if it had been pleaded to the Bill (*u*). Thus, it has been held, that a defendant insisting upon the benefit of the Statute of Limitations by way of answer, may, at the hearing, have the like benefit of the statute, as if he had pleaded it (*x*). So also, if a defendant can offer a matter of plea which would be a complete bar, but has no reason to protect himself from any discovery sought by the Bill, and can offer circumstances which he conceives to be favourable to his case, and which he could not offer together with a plea, he may set forth the whole matter in the same manner. Thus, if a purchaser for a valuable consideration, clear of all charges of fraud or notice, can offer additional circumstances in his favour which he cannot set forth by way of plea, or of answer to support a plea, as the expending a considerable sum of money in improvements with the knowledge of the plaintiff, it may be more prudent to set out the whole by way of answer, than to rely on the single defence by way of plea, unless it is material to prevent disclosure of any circumstances attending his title (*y*).

Benefit of it not to be had till the hearing.

With respect to the effect of claiming the same benefit by answer, that the defendant would have been entitled to if he had demurred to the Bill, or pleaded the matter, alleged in his answer, in bar; it is to be noticed, that it is only *at the hearing of the cause* that any such benefit can be insisted upon. At the hearing, however, the defendant will be entitled to all the same advantage of this mode of defence, that he would have had, if he had adopted the more concise mode of defence by demurring or pleading; and his right to costs, in case of his success, will not be affected by the course of proceeding which he has adopted, although it has occasioned more expense to the plaintiff than he would have incurred by simply demurring or pleading to the Bill (*z*).

(*u*) Lord Red. 249.
(*x*) Norton v. Turvill, 2 P. Wms. 144.
(*y*) Lord Red. 249.
(*z*) Wray v. Hutchinson, 2 M. & K. 235; vide Milligan v. Mitchell, 1 M. & Craig. 433, and ante, vol. 1, 551.

Of answering the plaintiff's case.

We come now to the consideration of that part of the answer which consists of the examination of the defendant to the allegations in the Bill, or in other words, of the answer to the plaintiff's case.

What answer plaintiff may require.

The nature of the answer which a plaintiff has a right to require from each defendant upon the record, is sufficiently shewn by the form of words made use of in the Bill for requiring an answer, viz.—'*that the defendant may, upon his corporal oath,* (or if entitled to the privilege of peerage, upon his attestation of honour,) *according to the best and utmost of his knowledge, recollection, information, and belief, full, true, direct, perfect, and sufficient answer make to all and singular the several matters and things hereinbefore contained, and that as fully and particularly as if the same were here again repeated, and he thereunto severally and distinctly interrogated.*'

With respect to the matter to be answered.

In considering the manner in which this requisition is to be complied with, I shall first direct the reader's attention to the *matter* to which the defendant must answer, and then to the *manner* in which the answer is to be framed; but before I proceed to discuss these points, it is right to call his attention to the fact, that the answer which they require, is to the matters and things *before* mentioned in the Bill; and that such answer must be as full and particular, as if the same were again repeated, and interrogatories administered to the defendant upon each. It is true that, in order more particularly to direct the notice of the defendant to the parts to which the plaintiff requires an answer, and to prevent evasion on the part of the defendant, it is usual to add a repetition, by way of interrogatory, of the matters most essential to be answered(*a*), which interrogatories must be fully answered; but a mere answer to those interrogatories only, will not be a sufficient compliance with the requisition in the Bill, unless they go to all the facts stated or charged in the Bill, to which the plaintiff has a right to

Defendant must answer the statements and charges,

and not confine himself to the interrogatories.

(*a*) Ante, vol. 1, 467.

Answer to plaintiff's case.

require an answer. If any facts are stated in the Bill, which are material to the plaintiff's case, they must be answered, even though the plaintiff does not call the defendant's attention to them by specific interrogatories. In framing an answer, therefore, though it is necessary to follow the interrogatories, it is equally necessary to attend to the statements and charges in the previous part of the Bill; otherwise the answer, though perfectly full and sufficient, as far as the interrogatories go, may actually prove insufficient, in so far as it does not extend to some matter which is not interrogated to. Another reason why, in answering a Bill, a defendant should compare the interrogating part with the previous statement and charges is, because, either from inadvertence or design, the interrogatories may embrace subjects which are not to be found in the other parts; in which case, as we have seen, a defendant is not bound to answer them (*b*), though if he does so, he will thereby put them in issue (*c*).

Rule, that a defendant who answers, must answer fully.

With respect to the *matter* to which the defendant must answer, the rule appears to be, that a defendant who submits to answer, must answer fully; that is, he must answer the whole of the statements and charges contained in the Bill, and all the interrogatories founded upon them, at least, so far as they are necessary to enable the plaintiff to have a complete decree against him. This is not a modern rule.—It is an ancient course of proceeding, identified with the immemorial practice of the Court; and it applies to all general objections to the discovery, as incidental to the defence of the suit (*d*).

Some doubt appears at one period to have been entertained, whether in cases in which the defendant, by his answer, totally denied the plaintiff's right, he could be compelled to give a discovery to which the plaintiff could only be entitled consequentially upon his right (*e*); and in *Taylor* v.

(*b*) Ibid, vide etiam Jerrard v. Saunders, 2 Ves. jun. 454, 458.

(*c*) Ante, vol. 1, 489. It may be mentioned in this place, that if a Bill contains interrogatories which are not founded upon the previous statements or charges, exceptions will lie to it for impertinence. Vide Small v. Attwood, cited in Wigram on Disc. p. 74.

(*d*) Hare on Disc. 270.

(*e*) Marquis of Donnegal v. Stewart, 3 Ves. 446; Phelips v. Caney, 4 Ves. 107.

Answer to plaintiff's case.

Milner (*f*), Sir W. Grant, M. R., appears to have thought that he could not. In several subsequent cases, Lord Eldon appears to have considered the question as still open (*g*). But in *Mazarredo* v. *Maitland* (*h*), Sir John Leach, V. C., said, 'that point (viz.—whether a defendant can, by answer, protect himself from answering,) was much considered in *Somerville* v. *Mackay* (*i*); it is not expressly decided there, but I remember, during the argument, the Lord Chancellor strongly expressed his opinion, that a defendant could not answer as to part of a Bill, and refuse to answer the rest; and I think that is so useful a rule, that I shall always adhere to it.' In a subsequent case, ——— v. *Harrison* (*k*), the same learned judge treated the point as settled, and the general rule of the Court has ever since been in conformity with those decisions (*l*).

To what cases applicable.

It is to be observed, that this rule is applicable to all cases where the defence intended to be set up by the defendant, extends to the entire subject of the suit; such, for instance, as that the plaintiff has no right to equitable relief—or he has no interest in the subject—or that the defendant himself has no interest in the subject—or that he is a purchaser for a valuable consideration—that the Bill does not declare a purpose for which equity will assume a jurisdiction to compel a discovery—or that the plaintiff is under some personal disability, by which he is incapacitated to sue: in all these cases a defendant who does not avail himself of the objection to answering, either by demurrer or plea, but submits to answer the Bill, must answer it fully (*m*); unless he comes within any of the cases which have been before pointed out, as affording a special ground for objecting to the discovery sought, either because the discovery may subject him to pains and penalties, or to a forfeiture, or to something in the nature of a forfeiture; or because it is immaterial to the relief prayed; or because it may lead to a disclosure

In what cases a defendant may, by answer, decline answering.

(*f*) 11 Ves. 41.

(*g*) Vide Faulder v. Stuart, 11 Ves. 296, 302; Dolder v. Lord Huntingfield, ib. 293; Shaw v. Ching, ib. 303; Rowe v. Teed, 15 Ves. 372; and vide Peacock v. Peacock, 16 Ves. 52.

(*h*) 3 Mad. 66.

(*i*) 16 Ves. 382.

(*k*) 4 Mad. 252.

(*l*) Vide Hare on Disc. 255, 256; vide etiam Thorpe v. Macauley, 5 Mad. 218, 231.

(*m*) Hare on Disc. 256.

of matters which are the subject of professional confidence, or of the defendant's own title, in cases where there is not a sufficient privity between him and the plaintiff to warrant the latter in requiring a disclosure of it (*n*). The principle upon which the court proceeds, in exempting a defendant from a discovery under any of the above circumstances, has been fully discussed in considering the grounds upon which a defendant, although he does not object to the relief, provided the plaintiff makes out a case which may entitle him to it, may demur to the discovery sought; it is only necessary, therefore, to repeat in this place, what has been before stated, that if a defendant objects to a particular discovery upon any of the grounds above stated, he may, where the grounds upon which he may object appear upon the Bill, decline making such discovery by submission in his answer (*o*).

Answer to plaintiff's case.

Effect of such a course.

It may be observed here, that the only difference occasioned by this method of objecting to the discovery is, that if the objection be taken by demurrer or plea, the validity of it is at once decided by the Court, upon argument of the plea or demurrer; whereas, if the objection be taken by answer, the validity of it must be decided in the first instance by a Master, upon exceptions to the answer, and can only come before the Court in the form of exceptions to the Master's report upon those exceptions, which is certainly a more circuitous and expensive mode of trying the question, than that afforded by demurring (*p*). It is to be recollected, however, that the great nicety required in pointing out, by demurrer, the particular part of the discovery objected to, renders such a course less likely to be successful, than that of submitting the point to the Court by the answer; and it has been held, that where the ground of objection is, that the discovery would render the defendant liable to pains and penalties, the proper course is to submit the point by answer, because by demurring, the defendant admits the fact to be true (*q*).

(*n*) Ante, p. 45.

(*o*) Ante, p. 65; Lord Red. 163.

(*p*) In the Court of Exchequer this objection to the mode of trying the right to compel a discovery by submission in the answer does not exist; as there the exceptions are, in the first instance, heard and decided upon by the Court.

(*q*) Honeywood v. Selwin, 3 Atk. 276.

Answer to plaintiff's case.

Rule requiring a full answer, extends to all matters as to which the plaintiff, if successful would have a consequential right of discovery, even though his title be denied,

Before we quit this part of the subject, it is right to direct the reader's attention to the fact, that the rule which compels a defendant submitting to answer, to answer fully, is not confined to requiring a full answer to all the facts and interrogatories which are necessary to establish the plaintiff's title, but it extends to require a discovery as to all those points with regard to which, supposing his case to be true, the plaintiff would have a right to a discovery from the defendant, even though the defendant by his answer denies the plaintiff's title, and the plaintiff, if he has no title, can reap no benefit from the discovery. Thus, if a Bill was filed for tithes, praying a discovery of the quantity of land in the defendant's possession, and of the value of the tithes, though the defendant insisted upon a modus, or upon an exemption from payment of tithes, or absolutely denied the plaintiff's title, he must yet have answered to the quantity of the land, and value of the tithes (*r*). Or if a Bill is filed against an executor, by a creditor of the testator, the executor must admit assets or set forth an account, though he denies the debt (*s*). So, also, if a Bill be filed for an account of partnership dealings, the defendant, though he denies the partnership, must set forth the accounts (*t*).

and the defendant sets up a title in himself.

It is to be remarked, that in several cases a distinction appears to have been taken, between answers which merely dispute the plaintiff's title, and those in which the defendant sets up a title in himself, apparently good, and which the plaintiff must remove in order to found his own title; in the last cases it has been considered that a defendant is not generally compelled to make a discovery, not material to the trial of the question of title (*u*). Thus, where a plaintiff filed his Bill, as heir, praying an account of personal estate and its application in discharge of the debts due upon real estate, and the defendants, by their answer, insisted that, under the will of the ancestor, the real estates had vested in another person, and that they were not bound to discover the personal estate, until the plaintiff had established his title, exceptions taken by the plaintiff to

(*r*) Lord Red. 251; Langham v. ——, Hardr. 130.

(*s*) Lord Red. 251, Randall v. Head, Hard. 188.

(*t*) —— v. Harrison, 4 Mad. 252.

(*u*) Lord Red. 251.

the answer, because the defendant had not set out an account of the personal estate, were overruled (*x*). So, also, where a Bill claimed a tithe of rabbits, on an alleged custom, and the defendant denied the custom, it was determined, that the defendant was not bound to set forth an account of the rabbits alleged to be titheable (*y*). And a like determination was made upon a claim of wharfage, against common right, the title not having been established at law (*z*). It does not, however, appear, that any such distinction as that suggested has been recognized in the more recent cases; and *Ovey* v. *Leighton* (*a*), where the Court held that a purchaser for valuable consideration, not protecting himself by plea, must answer fully, affords a direct authority to the contrary.

Answer to plaintiff's case.

The rule which has been above laid down, that a defendant cannot, by answer, protect himself from answering, but must do it fully, must, nevertheless, be understood with this limitation, viz., that he is only required to answer to those points which are necessary to enable the Court to make a decree against him (*b*).

Defendant only bound to answer to what will enable the Court to make a decree against him.

The application of this rule, so far as it exonerates a defendant from answering as to facts which are not material to the general object of the suit, or to the relief sought by the Bill, has been before fully discussed in treating of demurrers to discovery upon that ground (*c*). And we have also seen, that where a discovery would be immaterial to enable the plaintiff to obtain the decree which he seeks, it affords one of the grounds of exception to the rule, that a defendant who submits to answer the Bill must answer it fully. It may not be useless, however, in addition to the cases already referred to upon this subject, to refer to one or two cases where the point as to the defendant's right to exempt himself from answering as to

Not where discovery is immaterial to the general scope of the Bill.

(*x*) Gethin v. Gale, cited in Sweet v. Young, Amb. 354; vide etiam Gunn v. Prior, as cited 11 Ves. 291; Peacock v. Peacock, 16 Ves. 49, 53.

(*y*) Randall v. Head, ubi supra, 1 Eq. Ca. Ab 35. S. C.

(*z*) Northleigh v. Luscombe, Amb. 612; vide etiam Jacobs v. Goodman, 3 Bro. C. C. 487, n., 2 Cox. 282, S. C.; Hall v. Noyes, 3 Bro. C. C. 483; Marq. of Donnegal v. Stewart, 3 Ves. 446; Phelips v. Caney, 4 Ves. 107.

(*a*) 2 S. & S. 234; vide etiam Earl of Portarlington v. Soulby, 7 Sim. 28.

(*b*) Per Sir Thos. Plumer, V. C. in Agar v. Regent's Canal Company, Coop. 215.

(*c*) Ante, p. 55.

Answer to plaintiff's case.

such parts of the Bill has been recognized by the Court upon exceptions. In *Codrington* v. *Codrington* (*d*), a Bill was filed by a person claiming under the limitations of a settlement, to set aside an appointment, by which his title was defeated, on the ground of fraud, and upon an answer having been put in denying the fraud, the plaintiff amended his Bill, by inserting certain inquiries as to the manner in which the appointment was attested, in order to shew that it was not executed in the manner required by the settlement. To these inquiries, the defendant, by his answer, declined answering, and upon the question coming before the Court, upon exceptions to the Master's report, the Vice-Chancellor held, that the defendant was not bound to answer the interrogatories in the amended Bill, because, the plaintiff having by his Bill set up a case of fraud, the fact, whether the appointment was executed in conformity with the power or not, was immaterial to the case so set up. The same principle was also acted upon in the *Attorney-General* v. *The Merchant Taylors' Company* (*e*). An information alleged, that certain sums had been vested in the defendants for certain charitable purposes, and that the defendants had misapplied those sums, and also stated generally, that other sums were vested in the defendants upon the like trusts, but did not charge any application, or breach of trust respecting them. Upon the question coming before the Court upon exceptions, it was held, that the defendants were not bound to answer such general statement, because, although it was averred in the Bill, that the company had in their hands other funds than those respecting which they were charged with having committed a breach of trust, there was no allegation that there had been any misapplication of them, so that there could be no relief respecting them (*f*). It is in application of the same principle that the Court holds that where a Bill is filed by a creditor or legatee, or other person claiming a definite sum out of the personal estate of a deceased person against an executor or administrator, if the defendant admits

—Where defendant admits assets,

(*d*) 3 Sim. 519.
(*e*) 5 Sim. 328.
(*f*) Atty-General v. The Merchant Taylors' Company, ubi supra.

Answer to plaintiff's case.

assets in his hands sufficient to answer the plaintiff's demands, he need not set out an account of the estate (*g*), because the admission by the defendant, that he has assets in his hands to answer the plaintiff's demands, is sufficient to give the plaintiff all the decree he can require, so that any discovery as to the particular assets, &c., would be useless and irrelevant (*h*). And it may be observed, that the Court will not, in general, allow the circumstance of a plaintiff having a claim upon a defendant, to be used for the purpose of enabling such plaintiff to investigate all the private affairs of such defendant: thus a vendor in a Bill for a specific performance, cannot interrogate the vendee as to his property (*i*); such an inquisition into the circumstances of a defendant would not be permitted, even though the Bill should charge that the defendant was insolvent (*k*). In order to entitle a plaintiff to an answer to such an inquiry, he must shew some specific lien upon the defendant's property, and pray some relief respecting it (*l*); and even then the Court will not compel the defendant to make such discovery where the interest which the plaintiff may have in it, is very remote in its bearings upon the real point in issue, and would be an oppressive inquisition (*m*).

or questions relating to defendant's own property.

Unless some lien is stated, and specific relief is prayed as to it.

Defendant need not answer questions, which, though material to the general object, do not affect himself.

The above cases, and those before cited, point out in what instances the defendant may decline to make a particular discovery, when it is irrelevant to the general scope and object of the Bill; a discovery may, however, be material to the plaintiff's general case, if made by some of the defendants, which would be wholly irrelevant if made by another; in such cases also, the defendant, from whom the discovery would be immaterial, is not obliged to make it. A defendant is, in fact, only obliged to answer to so much of the plaintiff's Bill as is necessary to enable the plaintiff to obtain a complete decree against him individually. Defendants in equity are frequently formal parties, and are introduced for the purpose

(*g*) Agar v. Regent's Canal Company, Coop. 215.

(*h*) Pullen v. Smith, 5 Ves. 21.

(*i*) Francis v. Wigzell, 1 Mad. 258.

(*k*) Vide Small v. Attwood, as reported in Wigram on Discovery, 74.

(*l*) Francis v. Wigzell, ubi supra.

(*m*) Wigram on Disc. 72; Dos Santos v. Frietas, cited ib.; Webster v. Threlfall, 2 S. & S. 190; vide etiam Janson v. Solarte, 2 Younge & Coll. 132.

Answer to plaintiff's case.

of bringing before the Court all persons who have an interest in the subject in dispute; and though in practice it is very common for each party to answer every part of the Bill, it is often unnecessary (*n*): thus a trustee, or incumbrancer, or heir at law, need only answer so much of the Bill as applies to him (*o*).

Trustees, incumbrancers, heir at law.

The propriety of this distinction is obvious, when the nature of a Bill in equity is considered, namely, that although it is a suit combining several parties for the purpose of obtaining an object, in which they are all in some manner interested, yet the suit is distinct as against each defendant; each defendant therefore, is liable only, so far as the Bill prays relief against him, and his defence may therefore be applicable to that part of the case only (*p*).

But, although there is no doubt of the existence of the rule, that a defendant is not bound to answer the plaintiff's Bill further than is necessary to enable the plaintiff to obtain a complete decree against himself, it is not always easy to apply this rule to practice. It is, in fact, so difficult to draw a line as to what is material and what is immaterial, that it is often a task of great difficulty and responsibility, on the part of the defendant or his Professional Adviser, to select the portion of the Bill which it is incumbent upon him to answer (*q*).. It is hoped, therefore, that the following remarks of one of the most eminent Chancery Draftsmen of his time, may not be found unacceptable to the Practitioner.

'Every interrogatory must be founded on the allegation of the Bill; if the allegation is irrelevant to the matter in question, it must be expunged for impertinence; otherwise it is, *primâ facie*, taken as relevant, and the defendant is therefore bound to answer every allegation bearing on his part of the case, whether he thinks it material or not. The Court is to judge, in case of doubt, whether the allegation applies to his part of the case; and if a Court was to see that a defendant, by accident, or to save expense (the passages being short), had

(*n*) Hare on Disc. 160.

(*o*) Agar v. Regent's Canal Com., Coop. 215.

(*p*) Wigram on Disc. 70.

(*q*) Hare on Disc. 161.

not referred the Bill for impertinence, but the matters were wholly immaterial, or that he was called on to answer a part of the case, which, though not impertinent, had no reference to him, it would not, on exceptions, compel the defendants to answer that part; but if there can be any doubt, whether the answer may or may not be material, the defendant must answer. It is in this sense that I expressed myself that the defendant is bound to answer, whether the question is material or not; as the materiality or immateriality is not a matter of argument, inasmuch as, if it admits of a doubt, he ought to answer (*r*).'

Answer to plaintiff's case.

The rule that a defendant must answer the whole of the statements and charges contained in the Bill, and all the interrogatories founded upon them appears to admit of further exceptions in cases where the defendant, who is a trustee, or in the nature of one, states, upon his answer generally, that he is a stranger to several matters and things in the Bill mentioned, and that he cannot set forth any further or other answer thereto, either as to his knowledge, belief, or otherwise; in such a case it seems, that where it appears clearly that no benefit would result to the plaintiff from requiring an answer to each fact and interrogatory, the answer will be considered sufficient: thus where a Bill was filed against the assignee of a bankrupt for an account and injunction to restrain proceedings at law, and one of the defendants put in an answer stating that his name had been used in the action at law without his knowledge or authority, and that he had not acted as assignee except in some trifling particulars not connected with the subject of the Bill, and was wholly ignorant of the matters in the Bill set forth, the Lord Chief Baron (Alexander) overruled the exceptions which had been taken to the answer, on the ground that the defendant had not answered each interrogatory (*s*).

Where defendant states himself to be a stranger to the facts.

It seems to have been at one time the subject of doubt, whether it is the province of the Masters to determine whether a defendant may withhold a discovery or refuse to answer

Master to decide upon the materiality of discovery.

(*r*) Mr. Bell's Evidence, Cha. Rep. Appx. A 9.

(*s*) Jones v Wiggins, 2 Y. & J. 385; vide etiam Olding v. Glass, 1 Y. & J. 340.

Answer to plaintiff's case.

interrogatories on the ground of immateriality;' the question was, however, fully investigated by Sir Thomas Plumer, V. C., in *Agar* v. *The Regent's Canal Company*(t), when his Honor expressed his opinion to be in favour of its being the duty of the Master, upon exceptions to an answer being referred to him, to consider the materiality of the discovery required. And the question has since been placed beyond all doubt by Lord Lyndhurst's Orders(u). by which it is directed 'that the Master, in deciding on the sufficiency or insufficincy of any answer or examination shall take into consideration the relevancy or materiality of the statement or question referred to.'

Matters of law need not be answered,

When it is said, that a defendant who answers should answer fully to all the matters in the Bill, it must be understood only as to matters which are *well pleaded*, that is, to the facts stated and charged. To matters of law, or inferences of law drawn from the facts, he need not answer. Thus, a defendant must answer, whether a will, executed before the recent statute(x), was published by the testator in the presence of three witnesses; but he need not answer to an interrogatory requiring him to say, whether the publication was such as by law is required to pass freeholds by devise; sometimes a defendant, instead of answering such interrogatories, submits the point to the judgment of the Court; but it is not necessary to do so.

but may be submitted to the Court.

Of the manner in which plaintiff's case must be answered.

Having shewn what part of the matter contained in the Bill is material or necessary to be answered, we shall proceed to point out the manner in which a defendant must answer the Bill, or those parts of it, to which it is necessary that an answer should be given.

In what cases positive answer is necessary.

A defendant must answer *'as to his knowledge, remembrance, information, and belief.'* And, in general, if a fact is charged which is in the defendant's own knowledge, as if done by himself he must answer positively, and not to his remembrance or belief only, if it is stated to have happened within seven years be-

(t) Coop. 212.
(u) Ord. 1828. LXXIV.
(x) 1 Vict. c. 26.

fore (y). It seems, however, that where a special cause is shewn so positive an answer may be dispensed with (z). And in *Hall* v. *Bodley* (a) it is said, that a defendant having sworn in his answer, that he had received no more than a certain sum, *to his remembrance*, it was allowed to be a good answer. As to facts which have not happened within his own knowledge, the defendant must answer as to his information *and belief*, and not as to his information merely, without stating any belief either one way or the other (b). It is not, however, necessary to make use of the precise words 'as to his information and belief,' the defendant may make use of any expressions which are tantamount to them: thus, to say that the defendant cannot answer to facts inquired after, as to his belief *or otherwise*, is generally considered a sufficient denial; for though the word '*information*' is not used, the expression '*belief or otherwise*' is held to include it. And so, where an answer was in this form—'*And this defendant further answering saith, it may be true for any thing he knows to the contrary*, that, &c.,' and after going through the several statements, it concluded thus—'*but this defendant is an utter stranger to all and every such matters, and cannot form any belief concerning them;*' the Vice-Chancellor (Sir L. Shadwell,) was of opinion, that the defendant in stating himself to be an utter stranger to all and every the matters in question, did answer as to his information, and did, in effect, deny that he had any information concerning them (c). It may be collected from the above case, that a defendant cannot, by merely saying 'that a matter may be true for any thing he knows to the contrary,' avoid stating what his recollection, information, or belief, with reference to it is, or saying that he has no recollection or information, or that he cannot form any belief at all concerning it, either in these words or in equivalent expressions.

Answer to plaintiff's case.

That where facts are not in defendant's own knowledge.

But defendant must answer as to his belief.

Effect of words, belief or otherwise.

It may be observed here, that where defendants have in their power the means of acquiring the information necessary to enable them to give the discovery called for, 'they are

Defendant must make use of due diligence to acquire information.

(y) Prac. Reg. 13.
(z) Ibid.
(a) 1 Vern. 470.
(b) Coop. Eq. Pl. 314.
(c) Amhurst v. King, 2 S. & S. 183.

Answer to plaintiff's case.

bound to make use of such means, whatever pains or trouble it may cost them; therefore, where defendants filling the character of trustees, are called upon to set out an account, they cannot frame their answer so as merely to give a sufficient ground for an account in the Master's Office; they are bound to give the best account they can by their answer, not in an oppressive way, but by referring to books, &c., sufficiently to make them parts of their answer, and afford the plaintiffs an opportunity of inspection, in order that they may be able to ascertain whether that is the best account the defendants can give (*d*). It is, however, to be observed, that where executors or other trustees are called upon to set out accounts, they must set them forth; although for the purpose of rendering their schedules less burthensome, they may, instead of going too much into particulars, refer to the original accounts in their possession in the manner above stated; and when it is said that a defendant may refer to accounts in his possession, it must not be understood as authorizing him to refer, by his answer, to accounts made out by himself for the purposes of the case, but only to accounts previously in existence (*e*). The same rule which has been before stated, with respect to corporations aggregate, viz.—that it is their bounden duty before they put in their answer, to cause every deed, paper, and muniment in their possession or power, to be diligently examined, and to give in their answer, all the information which results from such examination (*f*), may, with propriety, be applied to all individuals who are required to answer a Bill.

As to setting out accounts, &c.

Answer must be direct.

To so much of the Bill as it is necessary and material for the defendant to answer, he must speak directly and without evasion; and must not merely answer the several charges literally, but he must confess or traverse the substance of each charge (*g*). Thus, if a defendant is charged with having in his possession, custody, or power, books, papers, or writings, &c., a statement in his answer that there are certain books, papers or writings, &c., in the West Indies, the particulars of which he

As to possession, &c., of documents.

(*d*) White v. Williams, 8 Ves. 193.

(*e*) Arguendo Alsager v. Johnson, 4 Ves. 224.

(*f*) Ante, vol. 1, 189; Attorney-General v. The Bailiffs, &c. of East Retford, 2 M. & K. 35.

(*g*) Lord Red. 250.

is unable to set forth, without any answer as to the fact, whether they are in the defendant's possession, custody, or power, will be insufficient; for if the defendant admits the books, &c., to be in his possession, custody, or power, the plaintiff may make a motion calling upon the defendant to produce them; and the Court will, upon such motion, order them to be brought in within a reasonable time (*h*). And so, where a defendant stated in his answer, that he had not certain books, papers, and writings, in his possession, custody, or power, because they were coming over to this country, Lord Eldon held, that they were in his power, and that the defendant ought to have so stated in his answer (*i*). It may be observed here, that where books, papers, or writings, are in the custody or hands of the defendant's Solicitor, they are considered to be in the defendant's own custody or power, and should be stated to be so in his answer.

Answer to plaintiff's case.

Where they are abroad, or *in transitu*.

If a defendant is called upon to set out a deed or other instrument, in the words and figures thereof, he should do so or give some reason for not complying with the requisition (*ii*); he may, however, avoid this by admitting that he has the deed, &c., in his possession, and offering to give the plaintiff a copy of it (*k*). It may here be observed, that it is always a proper precaution, where a defendant sets out any deed or other instrument in his answer, whether in *hæc verba*, or by way of recital, to crave leave to refer to it, as, by so doing, the defendant makes it a part of his answer, and relieves himself from any charge in case it should be erroneously set out.

In what cases deeds, &c., must be set out in *hæc verba*.

If the defendant deny a fact, he must traverse it directly, and not by way of negative pregnant; thus, if a fact be laid to be done with divers circumstances, the defendant may not traverse it literally as laid down in the Bill, but he must traverse the point of substance, as if a man be charged to have done a thing upon such a day, or in such a place, he must not deny that he did it *modo et forma*, for that implies that in some sort he did it (*l*). So if he be charged with the receipt

Denial must not be by way of negative pregnant.

(*h*) Farquharson v. Balfour, Turn. & Russ. 190.

(*i*) Ibid. 191.

(*ii*) Prac. Reg. 204. As to the cases in which it may be prudent to set out documents in *hæc verba*, vide ante, vol. 1. p. 469.

(*k*) 1 Harr. 185. Ed. Newl.

(*l*) Beames's Ord. 29, 179.

(*m*) Cowel's Interp. Vide Bally v. Kenrick, 13 Pri. 291.

Answer to plaintiff's case.

of 100*l*., he must traverse that he hath not received 100*l*., nor any part thereof; and if he has received any part, he must set forth what part (*n*).

A general denial must be accompanied by an answer to special circumstances.

It may be observed, that where the Bill asked, whether on the marriage of a person, a settlement of the property of his wife was not executed? an answer that no settlement of any property was executed at the marriage of the person mentioned, was held to be insufficient; Sir John Leach, V. C., being of opinion, that although it is true that the general answer in the above case, included in it an answer to the particular inquiry, yet such a mode of answering might, in some cases, be resorted to, in order to escape from a material discovery (*o*). It is right, however, to notice, that in a recent case in the Court of Exchequer, the proposition laid down by Sir John Leach was considered as too general; and it was held, that although the maxim that *dolus latet in generalibus* is applicable in some cases, it is not so in all (*p*). In that case the Bill inquired, whether the defendant had not now, or whether he had not at some time, and when, in his possession, custody, or power, four books which were specified in the Bill? the defendant denied that he had in his possession or power the four books in the Bill mentioned, or that he had then or ever had any books relating to the matters inquired after by the Bill, save and except those set forth in his schedule; and upon an exception being taken to the answer, the Court held it to be sufficient. There can be no doubt, however, that the policy of proceedings in this Court is, that a general denial is not enough, but there must be an answer to sifting inquiries upon the general question (*q*); and the advantage of such policy is strongly illustrated by the circumstance referred to in *Hibbert* v. *Durand* (*r*). In that case the defendant, Mr. Durand, was interrogated by the Bill, whether he had not received certain sums of money, specified in the Bill, in the character of a ship's husband. In his answer, he swore that he had not received any sums of money whatever, except those

(*n*) Beames's Ord. 29, 179.

(*o*) Wharton v. Wharton, 1 S. & S. 235.

(*p*) Anon. 2 Younge & Coll. 310.

(*q*) Per Lord Eldon, Mountford v. Taylor, 6 Ves. 792.

(*r*) Cited in Prout v. Underwood, 2 Cox, 135; Hepburn v. Durand, 1 Bro. C. C. S. C.

set forth in the schedule to his answer, in which schedule the sums specified in the Bill were not comprised, but he did not otherwise answer the interrogatory. On exceptions being taken to the Master's report upon the sufficiency of the answer, Lord Thurlow declared himself to be of opinion, that a man could not deny, generally, particular charges which tended to falsify such general denial, and therefore, held the answer insufficient; and it appears by a note of the Reporter, that it turned out, in point of fact, that Mr. Durand afterwards recollected the receipt of the particular sums, and admitted them by his further answer. But although the Court requires, that all the particular inquiries should be answered as well as the general question, it will be no objection to the answer to the particular interrogatory, that the defendant has not answered it so particularly as to meet it in all its terms, provided it is with reference to the charge upon which the interrogatory is founded, and the object of the Bill, fairly and substantially answered (*s*). It is also to be noticed, that if any of the particular inquiries are, as to matters which are totally immaterial to the case, the defendant need not answer them. Thus, where a Bill required the defendant to set forth, whether certain bonds were not given for a valuable and *boná fide* consideration, and if not, for what consideration they were given? and the defendant denied that such bonds (if given,) were given for a valuable and *boná fide* consideration, but did not answer as to any other consideration; the Court of Exchequer held, that the question need not be answered, because the law knows of no other consideration than a *boná fide* consideration (*t*).

Answer to plaintiff's case.

It may be collected from the above cited case of *Hibbert* v. *Durand* (*u*), that where a defendant is asked by the Bill, whether he has not received certain sums of money specified in the Bill? the mere setting forth a general account by way of schedule to the answer, and referring to it as containing a full account of all sums of money received by the defendant, will not be sufficient; the defendant is bound to answer as to the specific sums, and all the circumstances attending them, which may be inquired after in the body of his answer (*x*).

Inquiry whether particular sums received not satisfied by reference to a schedule.

(*s*) Bally v. Kenrick, 13 Pri. 291.
(*t*) Daniel v. Bishop, 13 Pri. 15.
(*u*) Ubi supra.
(*x*) Lord Red. 250.

Answer to plaintiff's case.

Schedules may be used to set forth general accounts or lists of documents,

or in aid of defendant's case.

It is, however, the general practice, where a Bill requires the defendant to set forth a general account, or to answer as to monies received, or documents in his possession, to set forth the account or list of the sums, or documents in one or more schedules annexed to the answer, which the defendant prays may be taken as part of his answer, and such practice is very convenient, and in many cases indispensable. It may also be resorted to by the defendant, for the purpose of shewing the nature of his own case, or of strengthening it, even though there is nothing in the Bill itself, or in the interrogatories, which may render a schedule necessary. Thus, where a Bill was filed by merchants in England against merchants in India, for an account of the dealings and transactions between them, and one of the defendants (residing in England,) in answer to an allegation in the Bill, that some cotton which had been sent by the defendants to the plaintiffs was of inferior quality, said that he had no personal knowledge of the dealings between the two firms, but that he had received certain affidavits and certificates which his partners in India had caused to be made by experienced persons there, from which he believed the cotton to be of superior quality, and set forth the affidavits and certificates in a schedule *hæc verba;* Sir John Leach, V. C., and afterwards Lord Eldon, upon appeal, held that the schedule was not impertinent; because, although it was not absolutely necessary for the defendant to set out the affidavits and certificates, as he might have made them part of his answer by referring to them, yet he had a right to put them upon his answer, if he thought fit to do so; because, if his answer should be made use of in a Court of Law, it might be impossible for him to use the certificates and affidavits unless they were set out (*y*).

Of impertinence.

It is to be remarked, however, that it was apparently with great reluctance, that Lord Eldon came to the conclusion at which he arrived in the above case; and that upon dismissing the appeal, he did so without prejudice to the question as to costs, when applied for at the hearing of the case. And, in general, a defendant must be careful not to frame his schedule

(*y*) Parker v. Fairlie, 1 Turn. & R. 362; 1 S. & S. 295, S. C.; vide etiam Lowe v. Williams, 2 S. & S. 574.

Answer to plaintiff's case.

in a manner which may be burthensome and oppressive to the plaintiff, otherwise they will be considered impertinent. Thus, where a Bill was filed for an account, containing the following interrogatory, 'whether any and what sum of money was due from the house of A. to the house of B., and how the defendant made out the same? and the defendant, by his answer, set forth a long schedule, containing an account of all dealings and transactions between the two houses, Lord Eldon held the answer clearly impertinent, and that the defendant ought merely to have answered that such a sum was due, and that it was due upon the balance of an account (*z*). It is to be remarked that, in the above case, although there was an inquiry how the defendant made out that there was a balance, there were no particular inquiries in the Bill as to the items, constituting the account from which the defendants made out that there was a balance due to them; but even where there has been such an inquiry, the Court has gone the length of saying, that a schedule containing such items will be impertinent, if the items are set out with a minuteness not called for by the nature of the case. Thus, where the Bill called upon a defendant to set forth an account of all and every the quantities of ore, metals, and minerals, &c., dug in particular mines, and the full value thereof, &c., and the costs and expenses of working the mines, and the clear profits made thereby; and the defendant put in a schedule to his answer, comprising 3,431 folios, wherein were set forth all the particular items of every tradesman's bill, connected with the mines; the Court held the schedule to be impertinent (*a*). So where a defendant, in his schedule, set out at length a bill of costs, with observations with reference to another bill delivered for the same business, it was held impertinent, although the Bill called upon the defendant to set out how he computed and made out his demand, and all the particulars relating thereto, with interrogatories pointed to the particular items, and to a minute comparison of the two bills of costs (*b*). In

(*z*) French v. Jacko, 1 Mer. 357. (n).

(*a*) Norway v. Rowe, 1 Mer. 347; vide etiam M'Morris v. Elliot, 8 Pri. 674; Slack v. Evans, 7 Pri. 278 n.

(*b*) Alsager v. Johnson, 4 Ves. 217.

Answer to plaintiff's case.

like manner, it seems to be held, that in the case of an executor called upon to account for his disbursements, it is not necessary to set out every particular item (*c*). It is difficult, however, to point out any precise rules with regard to what will be considered impertinent in a schedule; much must depend upon the nature of each case, and the purposes for which the discovery is required: the cases above referred to, and the others which may be found in the books, however, shew that even though the plaintiff, by the minuteness of his inquiries, in some measure affords an excuse for the defendant setting forth a long and burthensome schedule, the Court will not, unless in instances in which from the nature of the case great minuteness is required, permit a defendant to load the record with useless and impertinent matter, even though the introduction of such matter might be justified by the terms of the interrogatories; on the other hand, it is to be observed, that the Court will not, where the defendant in complying with the requisitions in the Bill, has *bonâ fide* given the information required, though in a manner rather more prolix than might perhaps be necessary, consider the answer as impertinent; for although prolixity sometimes amounts to impertinence (*d*), whether the Court will deal with it as such, depends very much upon the degree in which it occurs (*e*).

Answer to amended Bills.

It has been before observed, that in answering an amended Bill, the defendant, if he has answered the original Bill, should answer those matters which have been introduced by the amendments only (*f*). In fact, the answer to an amended Bill constitutes, together with the answer to the original Bill, but one record, as much as if it had been engrossed on the same parchment (*g*), in the same manner that an original and an amended Bill are considered as the same record; upon this

(*c*) Norway v. Rowe, 1 Mer. 355.
(*d*) Slack v. Evans, 7 Pri. 278. (n).
(*e*) Gompertz v. Best, 1 Younge & Coll. 114.
(*f*) Ante, vol. 1, 509.
(*g*) Lord Red. 257; Hildyard v. Cressy, 3 Atk. 303.

principle it is that it has been held, that it is impertinent to repeat in the answer to the amended Bill, what appears upon the answer to the original Bill, unless by the repetition the defence is materially varied (*h*).

Answer to plaintiff's case.

It has been stated in a former part of this Treatise, that when a plaintiff amends his Bill by the insertion of matters which have occurred since the filing of the original Bill, the defendant instead of pleading or demurring to the amended Bill on that ground, may, by answer to the amended Bill, claim the same benefit that he would have been entitled to, if he had pleaded or demurred (*i*).

Title of answer.

It is frequently the practice in putting in an answer or demurrer, &c., to an amended Bill, to intitle it as 'an answer, &c., to the original and amended Bill;' it is, however, not necessary to do so, and 'an answer, &c., to the amended Bill' only, will be sufficient (*k*).

SECT. II.

Of the Form of Answers.

Joint or separate.

Two or more persons may join in the same answer, and where their interests are the same and they appear by the same Solicitor, they ought to do so, unless some good reason exists for their answering separately. It is to be understood, however, that the Court will not, before the hearing, compel any defendants to answer jointly by a visitation in the shape of costs (*l*); and that it is only at the hearing, when all danger of prejudice to the parties is over, that the Court will make any order upon the subject. In *Vansandau* v. *Moore* (*m*), where fourteen directors of a joint stock company against whom a Bill had been filed by a shareholder, for an account and dissolution of the concern, after appearing by the same Solicitor, filed fourteen separate answers with long schedules to each, (each of the answers and schedules being nearly *verbatim*

(*h*) Smith v. Searle, 14 Ves. 415.

(*i*) Ante, vol. 1, 511; vide etiam Milligan v. Mitchell, 1 M. & Craig, [illegible]

(*k*) Smith v. Bryon, 3 Mad. 428.

(*l*) Vansandau v. Moore, 1 Russ. 441.

(*m*) 2 S. & S. 509.

Joint or separate.

the same,) the Vice-Chancellor, (Sir John Leach,) upon motion made during the progress of the cause, directed a reference to a Master, to ascertain whether it was necessary or expedient, with a view to the defence, that separate answers should have been filed, but Lord Eldon afterwards discharged the order, on the ground that it was prematurely made (*n*).

Costs of separate answers.

By one of Lord Lyndhurst's orders (*o*), it is provided, that where the same Solicitor is employed for two or more defendants, and separate answers shall have been filed, or other proceedings had by or for two or more defendants separately, the Master shall consider in the taxation of such Solicitor's bill of costs, either between party and party, or between Solicitor and Client, whether such separate answers or other proceedings were necessary and proper; and if he is of opinion, that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed.

Where two defendants answer jointly, and one speaks positively for himself, the other may, in cases where he is not charged with any thing upon his own knowledge, say, that he perused the answer and believes it to be true; but it is otherwise where the defendants answer separately (*p*).

Of the title.

An answer is headed by a title, 'The answer of A. B., the defendant, to the Bill of complaint of C. D., complainant.' If two or more defendants join in the same answer, it is intitled 'the joint and several answer, &c., unless it be the answer of a man and his wife, in which case it is called the joint answer.' The answer of an infant (*q*), or other person answering by guardian (*r*), or of an idiot or lunatic answering by his committee (*s*), is so intitled.

Where a defect appears in title,

Where any defect occurs in the title of an answer, so that it does not appear distinctly whose answer it is, or to what Bill it is an answer, it will be a ground for taking it off the file for irregularity. Thus, where an answer was intitled the 'joint and several answer of A. B. and C. D., defendants, E. F. and G. H., complainants,' omitting the words, 'to the Bill of complaint of,' it was on motion, ordered to be taken off the file for

plaintiff may move to have it taken off the file;

(*n*) 1 Russ. 441.
(*o*) Ord. 1828. xxvii.
(*p*) 1 Har. 185, Ed. Newl.
(*q*) Ante, vol. 1, p. 337.
(*r*) Ibid. p. 248.
(*s*) Ibid. p. 219.

irregularity (*t*). So also, where the plaintiff was misnamed in the title, an order was made to take the answer off the file and for process of contempt to issue (*u*). It is to be observed, that in such cases the motion should not be to take the answer of A. B., &c., off the file, but it should be called in the notice, a certain paper writing, purporting to be the answer, &c. (*x*).

Title.

An answer with a defect of this sort in the title, is, in fact, a nullity, and may be treated as such; and although a defendant may, if he please, apply to the Court for leave to take the answer off the file and reswear it; it is not necessary that he should do so, but he may leave the answer upon the file and put in another (*y*).

so may the defendant, but it is not necessary that he should do so;

he may put in a fresh answer.

It may be observed here, that where an answer has been prepared for five defendants, it cannot be received as the answer of two only (*z*); nor can it be received as the answer of six (*a*). And where such an answer has been filed, it will, upon the application of the plaintiff, be ordered to be taken off the file upon motion (*b*). It seems, however, that after such an answer has been filed, the defendant may apply by motion to have it taken off the file and amended, by striking out the names improperly introduced (*c*).

An answer usually begins by a reservation to the defendant, of all advantage which may be taken by exception to the Bill, a form which is conjectured to have been intended to prevent a conclusion, that the defendant having submitted to answer the Bill, admitted every thing which by his answer he did not expressly controvert, especially such matter as he might have objected to by demurrer or plea (*d*). The probability of this conjecture is strengthened by the fact formerly noticed, that the general saving is usually left out of the answers of infants, because they are entitled to the benefit of every exception which can be taken to a Bill without expressly saving it (*e*).

General saving.

not necessary in answers by infants;

According to the Civil Law, the answer begins *sub protesta-*

adopted from Civil Law.

(*t*) Pieters v. Thompson, Coop. 249.

(*u*) Griffiths v. Wood, 11 Ves. 62.

(*x*) Ibid.

(*y*) Griffiths v. Wood, ubi supra.

(*z*) Harris v. James, 3 Bro. C. C. 399.

(*a*) Cope v. Parry, 1 Mad. 83.

(*b*) Cooke v. Westall, 1 Mad. 265; sed vide, Done v. Read, 2 V. & B. 310.

(*c*) Ibid.

(*d*) Lord Red. 253.

(*e*) Ante, vol. 1, 237.

Commencement.

tione de nimia generalitate, ineptitudine, obscuritate, nullitate, et indebita specificatione dicti libelli (*f*), in imitation of which, answers in equity claim the right of taking advantage by exception of 'all errors, uncertainties, insufficiencies, and imperfections,' in the Bill contained.

Substance of the answer.

The answers to the several matters contained in the Bill, together with such additional matter as may be necessary for the defendant to shew to the Court, either to qualify or add to the case made by the Bill, or to state a new case on his own behalf next follow (*g*) To this succeeds a general denial of that combination which is usually charged in the Bill (*h*).

General traverse.

It is the universal practice to add, by way of conclusion, a general traverse or denial of all the matters in the Bill. This is said to have obtained when the practice was, for the defendant merely to set forth his case without answering every clause in the Bill; and the form, though perhaps rather impertinent, if the Bill is otherwise fully answered, (and it has been determined to be in that case unnecessary (*i*),) is still continued in practice (*k*).

Signature by Counsel.

An answer must be signed by Counsel (*l*), unless taken by Commissioners in the country, under the authority of a commission issued for the purpose, in which case the signature of Counsel is not required (*m*), the Commissioners being responsible for the propriety of its contents, as it is supposed to be taken by them from the mouth of the defendant (*n*). The signature of Counsel is usually put to the draft before engrossment (*o*), but if it is put to the engrossment it will be sufficient. If the signature of Counsel is not affixed either to one or the other, the answer will be taken off the file on application by the plaintiff (*p*); but the Court will not allow such a course to be adopted at the instance of the defendant, where the interest of the plaintiff may be prejudiced by the proceeding (*q*).

(*f*) For. Rom. 90.
(*g*) Lord Red. 254.
(*h*) Ibid. As to the necessity of answering this charge, vide vol. 1, p. 483.
(*i*) Anon. 2 P. Wm. 87.
(*k*) Lord Red. 254.
(*l*) Wall v. Stubbs, 2 V. & B. 358; Brown v. Bruce, 2 Mer. 1.
(*m*) Barley v. Pearson, 3 Atk. 440.
(*n*) Lord Red. 255; Brown v. Bruce, ubi supra.
(*o*) Beames' Ord. 166.
(*p*) Wall v. Stubbs, ubi supra.
(*q*) Bull v. Griffin, 2 Anst. 563.

Signature.

Signature of defendant.

An answer must also be signed by the defendant or defendants putting it in (*r*), unless an order has been obtained to take it without signature (*s*); where an answer is put in by guardian or committee, the signature of such guardian or committee is alone required; and where such guardian is also a defendant, and puts in an answer in that character as well as in that of guardian, he need only affix his signature to the answer once (*t*).

in what cases dispensed with;

Sometimes the Court has, under special circumstances, directed the Six Clerk to receive an answer though it has not been signed by the defendant, as where a defendant went abroad forgetting or not having had time to put in his answer (*u*), or where a defendant had gone or was resident abroad, and had given a general power of attorney to defend suits, &c. (*x*). It is to be observed, that when an answer is put in under the authority of a power of attorney, it is thought better, to take the answer without any signature, than that the person to whom the power is given should sign it in the name of the defendant (*y*). The power of attorney should be recited in the order, which authorizes the answer to be put in under it (*z*).

must be to the engrossment.

The signature of the defendant must be affixed to the engrossment and not to the draft, the object in requiring it, being to identify the instrument to which the defendant has given the sanction of his oath, for the purpose of rendering a conviction for perjury more easy (*a*). The practice of the Court of Exchequer, appears to require, that where an answer is written on more than one skin of parchment, every skin must be signed by the defendant (*b*), but it does not appear that any such rule exists in the Court of Chancery,

(*r*) Beames's Ord. 452.

(*s*) 2 Atk. 289.

(*t*) Anon. 2 J. & W. 553.

(*u*) —— v. Lake, 6 Ves. 171; —— v. Gwillim, ib. 285.

(*x*) Bayley v. De Walkiers, 10 Ves. 441; Harding v. Harding, 12 Ves. 159.

(*y*) Bayley v. De Walkiers, ubi supra.

(*z*) Ibid.

(*a*) 1 Harr. Ch. P. Ed. Newl. 170.

(*b*) Clarke v. Mansfield, 3 Pri. 605; Carter v. Bosanquet, 13 Pri. 604, 1 M'Lel, 456. S. C.; Bailey v. Forbes, 1 M'Lel. & Y. 463; Jacobs v. Badger, 1 Y. & J. 166; Lord Moncaster v. Braithwaite, 1 Younge, 382.

Oath, &c.

and in that Court the defendant's signature to the last skin is sufficient (*c*).

All answers, except those of peers or others entitled to the privilege of peerage, who, as we have seen, answer upon attestation of honour (*d*), or of corporations aggregate, which are put in under their common seal (*e*), must be upon the oath of the parties putting them in, unless they are Quakers or Moravians, who are allowed to make a solemn affirmation or declaration in lieu of an oath (*f*).

Form of oath or affirmation.

The form of the oath or affirmation administered to a defendant on putting in his answer, is as follows:—

'*You swear, (or solemnly affirm,) that what is contained in this your answer, (or plea and answer,) as far as concerns your own act and deed, is true to your own knowledge, and that what relates to the act and deed of any other person or persons, you believe to be true* (*g*).'

Form of attestation of honour.

Where an answer is put in upon attestation of honour, the form is addressed to the party—

'*My Lord ——, So much of this answer, as concerns your own acts and deeds, you wage your honour to be true, and so much as concerns the acts and deeds of any other person and persons you believe to be true* (*h*).

Where party is not a Christian.

The oath, when administered to a person professing the Christian religion, is upon the Holy Evangelists; but it is to be observed, that persons who do not believe the Christian oath, must, out of necessity, be put to swear according to their own notion of an oath (*i*). Therefore, a Jew may be sworn upon the Pentateuch with his hat on (*k*), and a Heathen may be sworn in the manner most binding on his conscience. In *Ramkissenseat* v. *Barker* (*l*), where the defendant to a cross Bill was resident in the East Indies, and professed the Gentoo religion, the Court

(*c*) 1 Smith's Ch. Pr. 244.
(*d*) Ante, vol. 1, p. 486.
(*e*) Ibid. p. 189.
(*f*) Vide Stat. 7 & 8 W. 3, c. 34. and 3 & 4 W. 4. c. 49. It is to be observed, that an affirmation cannot be taken under a commission authorizing the Commissioners to take an answer upon oath; Parke v. Christy, 1 Y. & J. 533.
(*g*) 1 Turn & V. 544.
(*h*) Ib. 547.
(*i*) Omychund v. Barker, 1 Atk. 21, 46.
(*k*) Hind. 228.
(*l*) 1 Atk. 19.

directed a commission to the East Indies, and empowered the Commissioners to administer the oath in the most solemn manner as in their discretion should seem meet, and if they administered any other oath than the Christian, to certify to the Court what was done by them.

Oath, &c.

In what cases dispensed with

Sometimes, upon the consent of the plaintiff, an answer may be put in without oath, or without oath or signature, and this practice is frequently resorted to in amicable suits, an answer, however, without oath or signature, cannot be received, unless an order to that effect has first been obtained, either upon motion or petition, which must be passed and served upon the adverse Clerk in Court, and then left with the defendant's Clerk in Court (*m*). This order, if asked for on the part of the defendant, cannot be obtained without the consent of the plaintiff (*n*). Where it is applied for on the part of the plaintiff, the defendant's consent is not required (*nn*), unless the defendant is abroad, in which case the Court requires the consent of Counsel, and to be satisfied that the person instructing Counsel to consent is properly authorized by the party (*o*). The place of the defendant's residence must be stated in the order.

not where party is in a state of imbecility.

It is to be observed, that the Court will not permit the answer of a defendant, represented to be in a state of incapacity, to be received without oath and signature, though a mere trustee and without interest; the usual course, in such case, being for the Court to appoint a guardian by whom the defendant may answer (*p*).

In the case of a prisoner.

It has been before shewn, that, under the 1 W. 4, c. 36, where a prisoner in custody for want of answer, fills the character of a mere trustee, the plaintiff is empowered to put in a formal answer for such defendant, without oath or signature. For information with regard to the course of proceeding to be adopted in such cases, the reader is referred to Chap. IX. Sec. III. of this treatise (*q*).

(*m*) Hind. 228.

(*n*) —— v. Lake, 6 Ves. 171; —— v. Gwillim, ib. 285.

(*nn*) Codner v. Hersey, 18 Ves. 468.

(*o*) Bayley v. De Walkiers, 10 Ves. 441; Codner v. Hersey, ubi supra.

(*p*) Wilson v. Grace, 14 Ves. 172.

(*q*) Ante, v 1, 694.

Oath, &c., dispensed with.

The method of dispensing with the attestation of honour of a peer or peeress putting in an answer, is, *mutatis mutandis*, the same as the method adopted for dispensing with the oath of a commoner (*r*).

It is said that, by the general rule of practice, the signature to an answer taken without oath, must be attested by the defendant's Solicitor, or by some respectable witness, without which it cannot be filed, and that, where a Clerk to a Solicitor attested the signature to an answer put in without oath by a party he had never even seen, the answer was suppressed, and the Clerk threatened with committal for a contempt (*s*).

An answer put in without oath or attestation of honour, and accepted without either of those sanctions, gives the same authority to the Court to look to the circumstances denied or admitted in the answer so put in, for the purpose of administering civil justice between the parties, as if it was put in upon attestation of honour or upon oath (*t*). It seems, however, that no exceptions can be taken to an answer so put in (*u*).

Sect. III.

Of Taking and Filing Answers.

Time for answering under the old practice.

Formerly, a defendant had, in all cases, by the course of the Court, eight days, exclusive of the day of appearance, to answer the plaintiff's Bill. If he could not in that time complete his answer, the Court, upon application, would of course grant him three orders for time. The time limited by these orders depended upon the residence of the defendant, if he resided within twenty miles of London, (which constituted the

(*r*) Hind. 228.

(*s*) 1 Turn. & V. 539.

(*t*) Per Lord Eldon, Curling v. Marquis Townshend, 19 Ves. 628.

(*u*) Hill v. Earl of Bute, 2 Fowl. Ex. Pr. 10.

cause a town cause,) the Court made an order, upon the first application for one month; upon a second application, for three weeks; and, upon the third, for a fortnight (*a*).

Time for answering.

If the defendant usually resided above twenty miles from London, (which is a country cause,) he was entitled to three orders for time to put in his answer, six weeks upon the first application, three weeks upon the second, and a fortnight upon the third, and this in all cases, whether he came to town, and swore his answer at the public office, (which he might do if he pleased,) or whether he obtained a commission to take his answer in the country (*b*). It is to be observed, that besides the time allowed under the usual orders, the defendant in a country cause generally gained a further advantage by craving, on his appearance and before taking an order for time, a common *dedimus*, or commission, to take his answer, in the country; by this means he avoided the necessity of asking for time till the return of the *dedimus*, which, if his appearance was entered in the vacation, was not till the first day of the ensuing term; or, if the appearance was in term time, till the last return of the same term. This practice, however, of craving a common *dedimus*, was abolished by Lord Lyndhurst's Orders (*c*), which declared that a defendant in a country cause should no longer be permitted to crave the common *dedimus*: but should either put in his answer within eight days after his appearance, or should obtain the usual orders for time. And now, by Lord Brougham's Orders, the whole practice of obtaining the ordinary orders for time has been superseded, and an extended time for that purpose has been given in all cases, without the necessity of an application to the Court.

Time for answering under New Orders.

By the 10th of those Orders it is declared, that in every cause where an original or supplemental Bill, or Bill of revivor, shall be filed, a defendant shall, after appearance and without order, be allowed *eight weeks* in a town cause, and *ten weeks* in a country cause, to plead, answer, or demur, *not demurring*

(*a*) Prac. Reg. 16; Hind. 225.
(*b*) Prac. Reg. 16.
(*c*) Ord. 1828, III.

Time for answering.

alone (*d*), to any such original or supplemental Bill, or any such Bill of revivor, to which an answer is required; and *five weeks* in a town cause, and *seven weeks* in a country cause, to plead, answer, or demur, not demurring alone to any amended Bill to which the plaintiff shall require an answer, but that *twelve* days only shall be allowed to a defendant to demur alone to any such original, amended, or supplemental Bill, or Bill of revivor.

Where defendant is in contempt for not appearing.

By the 12th of the same Orders it is provided, that where a defendant is in contempt to an attachment for want of appearance, the interval between the day fixed by the *subpœna* for appearance, and that on which the same is actually entered, shall be deducted from the time allowed to a defendant to plead, answer, or demur, not demurring alone. And by the 13th Order it is directed, that the day on which an order for the plaintiff to give security for costs is served, and the period from thence to and including the day on which the security is given, shall not be reckoned in the computation of time allowed a defendant to plead, answer, or demur.

Where plaintiff has been ordered to give security for costs.

Application for further time,

The above Orders are not intended to deprive a defendant of the power, which he before enjoyed, of making a special application for further time, in case the circumstances of his case renders it impossible for him to put in his answer within the periods limited by it for that purpose. Previously to the 3 & 4 W. 4, c. 94, applications of this nature were made to the Court, but by the 13th section of that act it is enacted, that the Masters in Ordinary shall hear and determine all applications for time to plead, answer, or demur, and that it shall be lawful for either party to appeal by motion from the order made on such application to the Lord Chancellor, Master of the Rolls, or Vice Chancellor, whose order made on such appeal shall be final and conclusive. And, by the 14th section of the same Act, it is enacted, that no such application shall in future be made to any of the Judges of the Court, except on appeal, as before. This enactment has, however, been held not to take away from the Judges of the Court, the

must be made to a Master,

and Court can only decide upon appeal.

Court may, however, give time to answer on overruling a plea or demurrer.

(*d*) As to the effect of these words, vide ante, p. 80.

power they had upon overruling a plea or demurrer, of giving the defendant further time to answer, as part of the order (*e*).

Time for answering.

Cannot be made by party in contempt.

A defendant who is in want of further time to put in his answer, must, in all cases, be careful to make his application to the Master, before an attachment has been issued against him, otherwise he will be in contempt, and will not be entitled to make it. Where, however, upon the defendant's time for answering having expired, the plaintiff's Clerk in Court gave notice, on a Saturday, that he must attach the defendant at the next private seal, which was on the Monday following, and on that day the plaintiff sealed an attachment; but, on the same day, the defendant, not knowing that the attachment had been sealed, applied for an order for time, and gave notice to the plaintiff's Clerk in Court that he had done so, the Vice-Chancellor, upon motion, discharged the attachment for irregularity; his Honour being of opinion that in applying for the order for time, on the Monday, which was the first day on which he could make the application after the notice of the plaintiff's Clerk in Court, the intervening day having been Sunday, due diligence had been used by the defendant in obtaining the order (*f*).

Secus where, after notice of attachment, he uses due diligence to obtain time.

Under the old practice of the Court, when the defendant applied for the third order for time, it was necessary that he should give an undertaking that he would, within four days, enter his appearance with the Registrar, and on so doing give his consent that, in case of not putting in his answer within the time limited by the order, a Serjeant at Arms should go against him as upon a commission of rebellion returned *non est inventus* (*g*). Under the New Orders of 1828, the whole time allowed by the 10th Order is given without any such undertaking being required; but it is provided by the Orders of 1833, Ord. XXI., that in every order granted by the Master, it shall be upon the same condition as that formerly required upon granting the third order for time, viz. that the defendant

Further time to answer only given on condition of defendant consenting to a Serjeant at Arms, &c.

(*e*) Waterton v. Croft, 6 Sim. 431.

(*f*) Taylor v. Fisher, 6 Sim. 566. vide etiam Barritt v. Barritt, 3 Swan. 395.

(*g*) Beames's Ord. 322, 455; Ante, vol 1, p. 620.

Time for answering.

shall, within four days, enter his appearance with the Registrar, and consent to a Serjeant at Arms, &c., unless under any special circumstances, (which circumstances are to be shortly stated in the order,) the Master shall otherwise direct (*h*).

If he does not comply with the condition, the order will be a nullity,

It is to be observed that the effect of the above Order is to make it a condition upon which the defendant is to have further time, that he shall enter his appearance with the Registrar, &c., within four days, so that if he does not comply with that condition, the order so obtained will be a nullity, and the plaintiff may, at the expiration of the four days, proceed with the ordinary process of contempt. A defendant, however, who does not think proper to expose himself to the penalty, by availing himself of such an order, after he has obtained it, cannot be obliged to do so, or to enter his appearance with the Registrar; and where, after such an order had been made by the Master, with the usual condition, the defendant who had obtained it refused to draw it up, and gave notice of his intention not to do so to the plaintiff's solicitor, whereupon the plaintiff drew up the order and applied to the Court, by motion, for an order that the defendant might enter his appearance with the Registrar, &c., Sir C. C. Pepys, M. R., refused the application with costs (*i*).

but he cannot be compelled to do so.

Of swearing to an answer in a town cause.

When an answer is to be put in in a town cause, or when a defendant in a country cause thinks proper to put in his answer in town, the course is to produce the defendant to one of the Masters of the Court, at the public office, (the answer having been first duly written upon parchment,) where the

(*h*) As to the process of entering an appearance with the Registrar, vide ante, p. 13.

(*i*) Judd *v.* Wartnaby, 2 M. & K. 813. The writer thinks it right to state, that the learned Reporters do not appear to have stated the Master of the Rolls' judgment with their usual accuracy. He is made to say, (page 816,) '*It is clear that the 21st of the New Orders does not alter the old practice, but that it leaves to the Master the same jurisdiction in respect of the three applications for time, unless under special circumstances the Master shall otherwise direct.*' This is, obviously, a mistake as the Order referred to does not give the Master any jurisdiction as to the three applications for time which are taken away by the 10th Order; what the 21st Order effects is, to give the Master the same power, on making an order for time, that the Court under the old practice exercised on granting the third order for time, viz., to make it conditional in the manner there pointed out.

Master will swear him to his answer in the form before pointed out (*k*). If no Master should be sitting at the public office, and the urgency of the case will not allow of delay till another day, the defendant may be sworn before one of the Masters at his private house (*l*). The defendant must, when sworn, sign his Christian and sirname at the foot of the answer, at the right hand, in the presence of the Master (*m*).

In a town cause.

When sworn at the public office, the answer is left there; if not sworn at the public office, it must be taken by the Master's clerk to the public office; and in either case it must remain there until the Clerk in Court fetches it away to be filed (*n*).

Where defendant is sick, &c.

Formerly, if a defendant living within twenty miles of London, was, by reason of illness, unable to come to the Master's office, the Master, upon receiving an extra fee, was bound to go to him for the purpose of swearing him to his answer; though the most common way, if the defendant was any distance from town, was to sue out a commission for the purpose of taking his answer. This, however, could only be had upon order obtained upon motion or petition, but now it is provided that, in case of illness, or other bodily infirmity, whereby a defendant resident not less than four miles from Lincoln's Inn Hall, shall be rendered unable to travel or leave home, he is entitled without order, upon affidavit thereof first made and duly filed, to have the same *dedimus* to take his plea, answer, or demurrer, (not demurring alone,) as he would have been entitled to had he been resident more than twenty miles from London, upon giving the same notice thereof to the plaintiff's Clerk in Court (*o*). When the defendant lives within four miles of Lincoln's Inn Hall, and is too sick to attend the office, the Master must still go to him.

If more than four miles from Lincoln's Inn.

—If within four miles of Lincoln's Inn.

It may be noticed here, that, under the old practice of the Court, if a defendant who was a prisoner in the Fleet, or any other prison, was desirous of putting in his answer, or of swearing an affidavit, it was necessary that one of the Masters of the Court should go to the prison for the purpose of admi-

Where defendant is a prisoner in the Fleet or other prison.

(*k*) Ante, p. 278.
(*l*) Prac. Reg. 18.
(*m*) Beames's Ord. 452, ante, p. 268.
(*n*) Hind. 227.
(*o*) Ord. 1833. IX.

In a town cause.

nistering the oath; but by the 1st W. 4, c. 36, s. 15, Rule 20, the Lord Chancellor is directed, by one or more commission or commissions under the great seal, (upon or in respect of which no fee shall be payable,) to nominate and appoint the Warden, Keeper, or other chief gaoler of every gaol within the city of London or the bills of mortality, and their deputies, to be Masters extraordinary of the High Court of Chancery, for the purpose of taking and receiving such affidavits and answers as any person or persons within any such prison, shall be willing and desirous to make, and for no other purpose.

It is also provided, that the person taking such affidavit or answer under the authority of the above commission, shall, in respect thereof, be entitled to receive a fee of one shilling and no more (*p*).

The same rule directs that a Clerk of a Master shall attend to take and carry back, to and from the prison, the answer, for which he is to be entitled to a fee of three shillings and no more. The answer must be taken by the Master's clerk, to the public office, in the same manner as when it has been sworn at the Master's private house.

Jurat of the answer.

It is to be observed that, previously to the answer being sworn, the *jurat* should be written at the top, on the left hand, which, when the answer is sworn, is signed by the Master administering the oath (*q*). This *jurat*, when the answer is sworn by one defendant, is in the following form:—'*Sworn at the public office, Southampton Buildings, in the county of Middlesex, the —— day of ———.*' If there are many defendants who are sworn together, the *jurat* is sworn by all the defendants, &c. (*r*). If the defendants are sworn at different times, there must be separate *jurats* for each defendant, or each set of defendants swearing. If the answer is sworn at the Master's residence, or in a prison or other place, the *jurat* should so express it (*s*).

Where answer upon attestation of honour.

Where an answer is put in upon attestation of honour, the course of proceeding, *mutatis mutandis*, is the same.

(*p*) The same autho'ty is also given to the Court of Exchequer.

(*q*) Hind. 227.

(*r*) Ib.; 1 Smith's Ch. Pr. 2nd ed. 246.

(*s*) Ibid.

In a town cause.

Where defendant is illiterate.

Where an answer is put in by an illiterate person who can neither read nor write, the practice of the Court of Exchequer requires that the Solicitor for the defendant should make an affidavit that he has read over the answer to the defendant, and that the defendant understood it, and that this should be stated in the *jurat*. And in the *Attorney-General* v. *Malim* (*t*), where, instead of the above form of taking the answer of an illiterate person, the *jurat* stated, (the answer having been taken by commission,) that the answer had been read over to the defendant, by one of the commissioners, and that the defendant declared that he perfectly understood it, the answer was considered irregular, and was, upon motion, taken off the file. And so where an answer, by an illiterate person, was not accompanied by any affidavit of his Solicitor as to its having been read over to him, &c., and the jurat did not express that he had affixed his mark in the presence of the Commissioners, it was ordered to be taken off the file for irregularity (*x*) In the Court of Chancery, however, an affidavit by the Solicitor is not required; but, in the jurat returned in that Court, it is expressly stated, that the party made his mark in the presence of the commissioners. The form of the jurat, in such cases, is as follows:—' *This answer was taken, and the above-named defendant, Richard Roe, has duly sworn to the truth thereof, upon the Holy Evangelists, at, &c., this —— day of ——, (the same having been first read over and explained to the said Richard Roe, who appeared perfectly to understand the same, and made his mark thereto in our presence,)*' &c. (*y*).

In the case of a foreigner.

In the case of a foreigner not sufficiently versed in the English language to answer in that tongue, an order of course must be obtained upon motion or petition, for an interpreter, and the answer being engrossed in the foreign language, a translation thereof must be made by the interpreter, upon parchment, and annexed. The foreigner must be sworn to his answer; in order to which, the interpreter attending is

(*t*) 1 Younge, 376.

(*x*) Pilkington v. Himsworth, 1 Y. & Coll. 612.

(*y*) Ib 615, note.

In a town cause. previously sworn to interpret truly, and conveys to the foreigner the language of the oath; at the same time he swears to the translation as true and just, to the best of his ability; and the *jurat* is adapted thereto (*z*).

Or deaf and dumb.

The same course of proceeding seems proper where the defendant is deaf and dumb (*a*). In a case, however, which occurred in the 18th Geo. 2, (1745,) a different course appears to have been adopted, and the Court, (the defendant being deaf and incapable of giving instructions for his answer,) ordered a commission to issue for taking the answer in the old way, with the Bill annexed, for the commissioners themselves to endeavour to take the answer (*b*).

Or blind,

Where a defendant is blind, some other person must swear that he has *truly, distinctly, and audibly read over the contents of the answer to the defendant*. The defendant must also swear to the answer (*c*),

Is is to be observed that it is an universal principle in all Courts, that *jurats* and affidavits, when contrary to practice, are open to objection in any stage of a cause; this does not depend upon any objection which the parties in a particular cause may waive, but upon the general rule that the document itself shall not be brought forward at all if in any respect objectionable with reference to the rule of the court. No act, therefore, of a plaintiff, can waive an irregularity in the *jurat;* and a motion to take an answer off the file on the ground of such an irregularity, was allowed, notwithstanding the plaintiff had taken an office copy of the bill (*d*).

In what manner filed.

After an answer has been sworn and left or brought to the public office, the defendant's Solicitor must give notice to his Clerk in Court, who will fetch it away and file it with his Six Clerk, having previously entered it in his cause book, and attached it to the Bill, marking it at the top with the day and year when filed, and subscribing his name at the bottom on the left side (*e*).

(*z*) Hind. 228; Simmonds v. Du Barre, 3 Bro. C. C. 263.

(*a*) Reynolds v. Jones, Trin. Term, 1818; 1 Smith's Ch. Pr. 245.

(*b*) Gregory v. Weaver, 2 Mad. Prin. & Prac. 363 n. (f).

(*c*) 1 Smith's Ch. Pr. 250.

(*d*) Pilkington v. Himsworth, 1 Y. and Coll. 612.

(*e*) Hind. 237.

In a town cause.

If the answer of another defendant has already been filed, he proceeds in the same manner as before, save that he does not annex the answer to the Bill, but only writes at the bottom of the answer, '*Bill with another answer to A.* (*i. e.* the plaintiff's Six Clerk,) *filed such a term with B.*, (*i. e.* the defendant's Six Clerk.)' (*f*)

Proceeding thereupon.

Having filed the answer, the defendant's Clerk in Court informs the plaintiff's Clerk in Court of it, who goes to his Six Clerk's study, (whither it has previously been transferred,) and takes it from thence, first making an entry thereof in the Six Clerk's book (*g*).

Reason for the precautions.

It is to be observed, that, according to the course of proceeding above detailed, care is taken that after an answer has been sworn, it shall pass through no hands but those of officers of the Court till it is put upon the file. Thus, when sworn at the public office, it remains in the custody of the Master's clerk attending that office, or, when sworn at the Master's house or in a prison, it remains in the custody of the Master's clerk attending on the occasion, who brings it to the public office, and from the public office it is carried to the file by a Clerk in Court, who is also a sworn officer, so that no opportunity is allowed to alter or tamper with the answer before it becomes a record of the Court, and no difficulty would be likely to occur in proving the answer to be the one sworn to upon an indictment for perjury. Where, however, the answer is put in without oath, such precaution is unnecessary, and the answer, properly engrossed, is merely taken by the Solicitor, with the order for taking it without oath, to his Clerk in Court, who files the answer, writing at the top, 'Without oath, by order, dated,' &c. (*h*)

Of taking an answer by commission.

Old practice.

It has been before stated, that, under the old practice of the Court, a defendant residing above twenty miles from town was entitled, upon appearing, and before taking the usual order for time, to crave a *dedimus* or commission to take his answer in the country. This was called a *common dedimus*, and only authorized the taking of an answer. Where a defendant was advised to demur and answer, or to plead and demur, or to de-

(*f*) Hind. 228. (*g*) Ibid. (*h*) Ibid.

By commission. mur, plead, and answer, a *special dedimus* or commission was necessary, which could only be issued upon an order for that purpose obtained by motion or petition.

New practice. By the 3d of Lord Lyndhurst's Orders, before referred to, the practice of craving a *common dedimus* before taking an order for time, was, as has been stated, put an end to, and a defendant living in the country was thereby obliged to put in his answer within eight days, or obtain the usual orders for time, (which, by the subsequent orders of Lord Brougham, has been limited to ten weeks in a country cause, and may be taken advantage of without order.) It seems, that it is, nevertheless, still the practice to issue a *common dedimus* in all cases where a defendant intends to put in an answer only to the Bill (*g*). Under such a *dedimus*, however, a defendant can only put in an answer, and if a demurrer and answer be put in, it will be irregular (*h*). Therefore, if a defendant wishes to answer to part of the Bill, and demur or plead to the remainder, he must sue out a *special dedimus*, by which the Commissioners will be authorized to take his plea, answer, or demurrer (*i*).

Common *dedimus*.

Special *dedimus*.

Formerly, a special *dedimus* to take a defendant's plea, answer, or demurrer, could only be obtained upon motion, but now a defendant is at liberty to sue out such a *dedimus* in the country, without order, on giving two days' notice in writing to the plaintiff's Clerk in Court to give Commissioners' names to see the same taken (*k*).

—— how obtained. In order to obtain either a common or a special *dedimus*, or a commission, the defendant's Clerk in Court must give notice in writing to the plaintiff's Clerk in Court, calling upon him within two days to give the names of persons to be appointed Commissioners on the part of the plaintiff, to see the defendant's answer taken in the country (*l*). The plaintiff's Clerk in Court, thereupon, if he intends to join in the commission, leaves the names of two or more Commissioners with the defendant's Clerk in Court, and the defendant naming two or

Where plaintiff names Commissioners.

(*g*) Tomlinson v. Swinnerton, 1 Keen, 9; *sed quære*, whether a special dedimus should not now be issued in all cases?

(*h*) Ibid.

(*i*) Ibid.

(*k*) Ord. 1833, IX.

(*l*) Hind. 231.

more likewise, all of them are inserted in the *dedimus;* the plaintiff's Clerk in Court, at the same time, directing (according to the instructions of his client,) to which of the plaintiff's Commissioners the defendant is to give notice of executing the commission (*m*).

By commission.

If the plaintiff's Clerk in Court omits to give his Commissioners' names within two days after receiving the notice the defendant is at liberty, upon such default, to sue out the *dedimus* directed to his own Commissioners (*n*). In the case of an ordinary *dedimus*, the practice was, if the plaintiff would not name Commissioners to take the defendant's answer, or suffer the defendant to have the commission directed to his own Commissioners, to make an application by motion in Court, or by petition to the Master of the Rolls, for an order upon the plaintiff to name Commissioners in two days, or in default that the defendant might take out a commission directed to his own Commissioners, which was granted of course (*o*).

Where plaintiff does not name.

It is ordered, that in all joint commissions to take answers, &c., the names of the Commissioners agreed on, shall be entered in a book to be kept for that purpose by the Six Clerk who has the carriage of the commission, and subscribed unto by each Six Clerk in the cause, or, in their absence, by their deputy or deputies, whereby no alteration may be had of the Commissioners' names agreed upon but by order (*p*).

It may be remarked here, that there is no reason why the defendant's own Solicitor should not be a Commissioner to take his answer (*q*); and it is no objection to a Commissioner that he is under twenty-one years of age, provided he is of sufficient age to take an oath (*r*).

Solicitor may be a Commissioner, or a person under age.

It is to be observed, that the 9th Order above mentioned (*s*), does not cause any alteration in the practice, with regard to issuing commissions to take answers in foreign countries; such commissions can, therefore, only be granted, as heretofore, upon an order to be obtained on motion or petition.

Commissions abroad must be upon order.

(*m*) Hind. 231.
(*n*) Ord. 1833. IX.
(*o*) Hind. 230.
(*p*) Beames's Ord. 112.
(*q*) Bird v. Brancker, 2 S. & S. 186.
(*r*) Prac. Reg. 117.
(*s*) Ord. 1833.

By commission.

No Commission without order, after attachment with proclamations returned;

By an ancient order of the Court, after a contempt duly prosecuted to an attachment with proclamations *returned*, no *dedimus* to take the answer, is to go without motion and affidavit of the party's inability to travel, or other good matter to satisfy the Court touching the delay (*t*).

Where, however, a defendant was in contempt for not appearing, and took a commission to answer, the Court would not quash it, nor force him to appear, but said, that if the commission had not been gone, but about it, (*i. e.* was about to issue,) the Court would have stayed it until appearance (*u*).

or after answer reported insufficient;

unless by consent.

It is also a rule of practice, that after an answer has been reported insufficient upon exceptions, no new commission shall be awarded for taking any further answer, unless by order on affidavit made of the party's inability to travel, or other good cause to satisfy the Court touching the delay, and first paying the costs of such insufficient answer, or by consent of the plaintiff's Clerk in Court for expediting the cause (*x*). Such consent is, however, usually given.

Form of *dedimns.*

Formerly, a *dedimus* or commission, either to take an answer, or a plea, answer, and demurrer, in a country cause, was only granted upon the supposition of the defendant's inability to travel, by reason of age, infirmity, or sickness; or in cases of noblemen, corporations, or the like; and, therefore, anciently were not to be granted but upon affidavit made of sickness, &c., or other good cause shewn; but since the business of the Court increased, it became a thing of course, and, therefore, the clause of impotency has been discontinued (*y*). The tenor of the Bill was also, in former times, inserted in or annexed to every commission (*z*), in order that the Commissioners might examine the defendant thereupon, and take his answer from his own mouth (*a*); but by the stat. 4 Ann. c. 16, s. 23, it is enacted, that no copy, abstract, or tenor of any Bill in Equity, shall go with the *dedimus* or commission for taking the defendant's answer; but that in lieu and recompense thereof, the sworn Clerks of the Court of Chancery thall take to their own use, in all causes, the

(*t*) Beames's Ord. 178. Ante, vol. 1, p. 608.
(*u*) Prac. Reg. 114.
(*x*) 1 Har. (Ed. Newl.) 202.
(*y*) Hind. 230.
(*z*) Ibid.
(*a*) For. Rom. 92, Prac. Reg. 112.

whole term fee of 3*s*. 4*d*., and also the whole fee or fees of and for all small writs made by the said sworn Clerks.

By commission.

The form of a *dedimus* to take a defendant's plea, answer or demurrer, is as follows:—

'VICTORIA, *by the grace of God, &c. To A. B., C. D., E. F., and G. H. greeting. Whereas John Doe hath lately exhibited his Bill of complaint before us in our Chancery, against Richard Roe, defendant, and whereas we have, by our writ, lately commanded the said defendant to appear before us;* KNOW YE *that we have given unto you, any three or two of you, full power and authority to take the answer of the said defendant to the said Bill, on his corporal oath upon the Holy Evangelists,* [or his plea upon his corporal oath, to be administered by you, or any three or two of you, or his plea or demurrer without oath, to be respectively made to the said Bill,] *and therefore we command you, any three or two of you, that at such day and place as you shall think fit, you go to the said defendant, if he cannot conveniently come to you, and take his answer (plea or demurrer respectively as aforesaid,) to the said Bill, the same being distinctly and plainly written upon parchment; and when you shall have so done, you are to send the same closed up under the seals of you, any three or two of you, unto us in our said Chancery* WITHOUT DELAY, *wherever it shall then be, together with this writ. Witness ourselves, &c.* (*b*).' The writ is indorsed '*By order of the Court,*' and a label is attached in the following form:—'*To A. B., C. D., E. F., and G. H., a* [*special*] *dedimus to take the* [*plea,*] *answer,* [*or demurrer,*] *of Richard Roe, defendant, at the suit of John Doe;*' and if the plaintiff has named Commissioners, the following words are added to the label, '*on six days' notice to E. F.,*' (naming the plaintiff's Commissioner to whom the notice is to be given.) (*c*).

It is to be observed, that the return of the *dedimus* is usually directed to be *without delay;* where such is the case, the dedimus, strictly speaking, if made out in term time, holds to the first return of the ensuing term; if in the vacation, to the last return of the subsequent term; however, by the practice, a *dedimus* need

(*b*) Hind. 238. (*c*) Ib. 239.

By commission. not be returned till the second return of Hilary and Trinity terms, because the vacations previous to those terms are so short (*d*). The proceedings, however, are adapted to the convenience of both parties, and the time to be allowed the defendant is settled by the Clerks in Court on both sides (*e*): care, however, must be taken to have the commission, with the answer, returned before the time limited by the orders for filing the answer has expired.

Where defendant is within twenty miles of London.

The form of a *dedimus* to take a defendant's answer within twenty miles of London, where the defendant is sick and unable to travel, is the same (*f*).

Where defendant is a peer, &c.

Where the defendant is entitled to the privilege of peerage, the words, '*upon his attestation of honour*' are inserted, instead of the words '*upon his corporal oath*' (*g*).

Where a corporation aggregate is defendant.

When the commission is to take the answer of a corporation aggregate, the Commissioners are empowered to take it under the common seal of the corporation.

Where defendant is a Quaker or Moravian,

Where the defendant is a Quaker or Moravian, the commission, after the recital of the subpœna, is in the following words:—'*But forasmuch as the said Richard Roe is one of the dissenters, called Quakers, (or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, as the case may be)* (*h*), *as is alleged; know ye, therefore, that we have given unto you, any three or two of you, full power and authority to take the answer of the said Richard Roe, upon his solemn declaration and affirmation, to be made before you, any three or two of you, according to the form of the statute in that case made and provided,*' &c. (*i*).

—— or a Jew or Pagan,

Where a defendant is a Jew, the words 'Holy Evangelists' may be left out of the form of the oath mentioned in the commission. And we have seen before (*k*), that where a defendant was a Gentoo, and the answer was to be taken in Calcutta, the Commission was directed to be in a special form, authorizing the Commissioners to administer the oath in the most solemn manner, as in their discretion should seem meet; or if

(*d*) Hind. 230; Prac. Reg 118.
(*e*) Ib. Hind. 229.
(*f*) Ante, p. 277.
(*g*) Hind. 239 n.
(*h*) Vide 3 & 4 W. 4, c. 49, s. 1.
(*i*) Hind. 238 n.
(*k*) Ante, p. 270.

they should think proper to administer another oath, certifying to the Court what they did (*k*).

By commission.

— or an infant,

It has been already stated (*l*) that, in the case of an infant, a commission may issue to assign a guardian, and another to take the answer, or that both proceedings may be authorized by the same commission; it is only necessary here to add, that in a *dedimus* to take the answer, the Commissioners are authorized to take the infant's answer by his guardian on such guardian's corporal oath (*m*).

or a lunatic, or person of weak intellect.

And so in the case of a lunatic, the Commissioners are authorized to take his answer by his committee, who, as we have seen before, must be previously appointed his guardians, by order made upon motion or petition (*n*). Persons of weak intellect also, must have guardians appointed by commission in the manner before pointed out (*o*), and the commission to take their answer must be made out accordingly.

The above distinctions in the form of commissions are necessary to be attended to, because a commission to take an answer in one form, will not authorize the Commissioners taking it in another; thus, Commissioners will not, under an authority to take an answer upon oath, be empowered to take the affirmation of a Quaker; and where it appeared by the caption of the answer that they had done so, the answer was ordered to be taken off the file (*p*).

Sealing, &c.

To the *dedimus* when prepared by the Clerk in Court, the names of the Master of the Rolls and of the Six Clerk are subscribed, both upon the writ and upon the label, and generally the Clerk in Court's name is added, in order to point out the Clerk to whom it belongs (*q*). The Clerk in Court then gives the writ to the bag-bearer of the office to have it sealed, who, when it is sealed, leaves it at the Clerk in Court's seat, at the Six Clerk's Office. The *dedimus* is then delivered to the defendant's Solicitor to be executed.

To whom delivered.

(*k*) Ramkissenseat v. Barker, 1 Atk. 19, supra.

(*l*) Ante, vol. 1, p. 230.

(*m*) Hind. 245.

(*n*) Hind. 252; Ante, vol. 1, p. 219.

(*o*) Ante, vol. 1, p. 248.

(*p*) Parke v. Christy, 1 Y. &. J. 533.

(*q*) Hind. 234.

Time for answering.

Where defendant is in a foreign country.

If the defendant is resident in a foreign country, it may be sent to some professional person there, to take care that it be properly executed. And though the foreign country be at war with this country, it must be there executed, in which respect, a commission to take an answer differs from a commission to examine witnesses, which it seems may be executed at the nearest neutral port (*r*).

Manner of executing the commission,

The manner of executing a commission or *dedimus* to take an answer, &c., is as follows:—Where the plaintiff has named Commissioners (which will appear from the label of the commission, requiring notice to be given to a particular Commissioner,) the defendant's Solicitor in the country must cause a notice in writing, of the time and place of executing the commission to be signed by two of the defendant's Commissioners and served upon the plaintiff's Commissioner, named in the label, six days before the day appointed for executing the commission. The notice may be in the following form:—

where plaintiff has named Commissioners.

'*We whose names are hereunto subscribed, having received a commission, issuing out of the High Court of Chancery, to us and others directed, to take the answer of C. D., defendant to the Bill of complaint of A. B., complainant, in a cause depending in the said Court. We do hereby give you notice, that we intend to execute the said commission, on ——, the —— day of —— instant, between the hours of —— and —— in the ——, at the house of W. G., situate in ——, in the county of ——, at which time and place you may be present, if you please, to see the same taken. Given under our hands, the —— day of ——, ——.*'

To Mr. —— *Plaintiff's Commissioner.*	T. P. J. H. (*s*).

Notice on Sunday.

If this notice be given on a Sunday, the commission may be executed on the Saturday following (*t*).

Party not attending, nor countermanding notice, liable to costs.

If the party who has the carriage of the commission gives notice of executing it, but neither countermands it in due time, (as three or four days before the time, or as the distance of the place, &c., may require,) nor executes it at the time, the

(*r*) —— v. Romney, Amb. 62.
(*s*) Hind. 234.
(*t*) Prac. Reg. 115.

Court, on motion, will order costs to be taxed for the adverse party's attendance (*u*).

By commission.

Where the plaintiff has not named Commissioners, no notice need be given, and the commission may be executed by the Commissioners named in the *dedimus*, *exparte* (*x*).

Where plaintiff has not joined,

On the day appointed the Commissioners are to meet, and if one only attends on each side it will be sufficient; but in case none of the plaintiff's Commissioners attend, the defendant must have two Commissioners present, because no fewer than two can take his answer and return the *dedimus* (*y*).

two Commissioners only sufficient.

It seems that where there is a joint commission, and the Commissioners of one party only attend, the Commissioners in attendance may, after waiting till six o'clock in the evening, proceed to take the answer; and where, notice having been given of executing a commission, the plaintiff's Commissioner attended at the place and day mentioned in the notice, from nine till twelve o'clock, and from one till three, and the defendant's Commissioners came not, whereupon the plaintiff's Commissioners went away, but the answer was taken and sworn the same day; upon the plaintiff, therefore, moving that the answer should be suppressed, the Court said, that the plaintiff's Commissioner should have staid till six o'clock (*z*).

If Commissioners of one party only attend, they must wait till six o'clock.

When the Commissioners are ready to proceed, the defendant's Solicitor, having prepared the answer or plea, and engrossed it upon parchment, produces it, together with the defendant, (who attends for the purpose of swearing it) to the Commissioners; whereupon one of the Commissioners, having opened the commission, interrogates the defendant in the following manner (*a*):—'*Have you heard this your answer read? and do you exhibit it as your answer to the Bill of complaint of John Doe?*' To which the defendant answering in the affirmative, the Commissioner proceeds to administer to him the oath or affirmation or attestation of honour, (as the case may be,) in the same form as a Master, when the answer is put in in London (*b*).

Form of swearing to an answer, &c.

(*u*) Prac. Reg. 116.
(*x*) Hind. 234.
(*y*) Ib. 235.
(*z*) Prac. Reg. 116.
(*a*) Hind. 235.
(*b*) Ibid. ante, p. 280.

By commission.

It is said that Commissioners may refuse to execute the commission, unless they are allowed to read the answer (*d*); and where a defendant, having a commission to take his answer only, tenders a demurrer to the Commissioners, and refuses to answer upon oath, they must return such his refusal, and the reason thereof, together with the demurrer, and leave the same to the consideration of the Court (*e*).

The defendant, having been sworn, &c., as above stated, must sign his answer in the presence of the Commissioners; and the answer thus taken, together with the schedules, (if there are any,) are to be annexed to the commission, and the Commissioners must then write the *caption* at the foot of the answer, thus:—

Caption.

In ordinary cases.

'*This (plea and) answer was taken, and the above-named defendant, Richard Roe, was duly sworn to the truth thereof on the Holy Evangelists, (and the demurrer of the said Richard Roe was taken without oath,) at the house of W. G., situate at ——, in the —— of ——, on the —— day of ——, in the —— year of the reign of her Majesty Queen Victoria, and in the year of our Lord one thousand eight hundred and ——, by virtue of the Commission hereto annexed, before us,*

'*A. B.*
'*C. D.*'

Must be varied according to the nature of the case.

This caption must be varied according to the nature of the case. Thus, in the case of a peer, &c., it must state the answer to have been taken '*upon the attestation of honour, &c.*' If it be the answer of a Quaker or Moravian, it must be expressed to have been taken upon the '*solemn affirmation;*' and if it be that of a corporation aggregate, it must be '*under the common seal of the said corporation, as by the said seal affixed appears,*' &c.

Must agree with the powers of the commission.

Care must be taken, in framing the caption, to adapt it to the circumstances of the case, for which purpose the form of the commission will afford the best guide (*f*). Care must also be taken to express correctly, whether it be an answer, or an

(*d*) 1 Harr. Ch. Pr. 276. ed. Newl.

(*e*) Prac. Reg. 118.

(*f*) Vide ante, p. 286.

answer coupled with a plea or demurrer, &c. (*g*). The Commissioners also should be particular, when the answer is by two or more defendants, to state that they are all sworn, because, where the caption of the joint and several answer of two defendants expressed only that it was *sworn*, without stating that the defendants were *both sworn*, the answer was suppressed (*h*).

By commission.

It has been stated, that the caption ought to be written at the foot of the answer; but in *Robinson* v. *Dickinson* (*i*), an order was made, by consent, that the Six Clerk should be at liberty to file the answer, notwithstanding the Commissioners had written the caption on the back of the engrossment, and had omitted to insert the name of the place where the guardian was assigned, and notwithstanding the error of having written the word *Evangelist* instead of *Evangelists*.

Return.

The answer and schedules with the caption, being thus annexed to the *dedimus* or commission, the return must be indorsed upon the *dedimus* thus:—'*The execution of this commission appears in a certain schedule,* or schedules, (if more than one skin,) *hereto annexed.*' And the return so indorsed must be signed by two Commissioners (*k*).

Proceeding when sent by a messenger. Oath of messenger.

The commission must then be tied up and sealed and directed to the Clerk in Court, and, if sent by a messenger, delivered to him by the Commissioners. The messenger or bearer, upon his arrival, is taken to the public office or other place before one of the Masters, where he must swear that he received the *dedimus* from the hands of one or more of the Commissioners therein named, and that it has not been opened nor altered since he so received it (*l*). This being done, the Clerk indorses it in the following manner:—

'31*st January,* 1838, *upon the oath of A. B. at (the public office) before,*' &c.

If the bearer or messenger be sworn at any other place, the indorsement must be properly varied.

(*g*) Hind. 236.
(*h*) Anon. Mos. 238.
(*i*) Cited 1 Smith's Ch. Pr. 252, 2nd ed.
(*k*) Hind. 236.
(*l*) Ib. 237.

By commission.

When dispensed with.

The above precautions are necessary in order to procure the chain of testimony as to the identity of the answer in case of an indictment for perjury, and can only be dispensed with by an order of the Court. Such an order will, it seems, sometimes be made against the will of the plaintiff, as in the case mentioned in *Moseley* (m), where the Court obliged the plaintiff to accept an answer from Tripoli, which had ignorantly been broken open on ship-board. In general, however, such an order will only be made upon consent; and although, in *Cox* v. *Newman* (n), an answer taken by commission abroad, (but which had been opened by the defendant's Solicitor, and read in the presence of the plaintiff and his Solicitor,) was ordered to be filed without the usual oath of the messenger; the order was made only under the peculiar circumstances of the case, the plaintiff having consented to the opening of the answer, and was declared by the Vice-Chancellor, (Sir Thomas Plumer,) to be one which was not to be considered as a precedent further than, that circumstances might induce the Court to permit it.

It may be noticed, that in the above case another was cited (o), in which, owing to some irregularity, the answer was ordered to be delivered to the Registrar until affidavits should be produced verifying the handwriting of the Commissioners, upon the production of which to the Clerk in Court, it was to be received and filed without the usual oath.

Commission must be delivered to Clerk in Court.

The messenger or bearer having been sworn, and the *dedimus* indorsed as above-mentioned, it must be left at the public office, and notice is to be given to the defendant's Clerk in Court, who must fetch it away; or the Clerk in Court, if he goes with the messenger who brings it, must, after the messenger has been sworn, take it to the Six Clerks' Office, and there open it.

By an order of the Court, all pleadings, commissions, and certificates belonging to the Six Clerks to receive, are, immediately upon the bringing in or return thereof into Court, to be

(m) Hornby v. Pemberton, Mos. 59.

(n) 2 Ves. & B. 168.

(o) Boddam v. Riley, cited ibid.

delivered to such Six Clerk's own hands as shall be Attorney in the cause, or to the hands of his deputy in his absence, and not to be from thenceforth in any wise kept back, nor any depositions or answers taken by commission, or other commission to be opened by any of their under-clerks, before they are delivered (*p*).

By commission.

If one of the Commissioners has the carriage of the commission, the above formalities with regard to swearing the bearer are dispensed with, and the practice is for the Commissioner to deliver it sealed into the hands of the Clerk in Court, by whom it is always accepted, without oath, and indorsed thus.—'(Date.) *Received by the hands of A. B., one of the Commissioners* (*pp*).'

Proceeding where the commission is brought up by a Commissioner.

The *dedimus* having been received by the Clerk in Court, from the Master's office, or from the Commissioner who is the bearer of it, he takes it immediately to the Six Clerks' Office, and files it with his Six Clerk in the manner before pointed out (*q*).

By the old practice of the Court, no second commission could be granted without the special order of the Court, upon good reason to induce the same, or upon the plaintiff's own assent (*qq*); and it does not appear that the New Orders have made any alteration in this respect. If, therefore, a Commissioner dies, application must be made to the Court for a new commission (*r*); preparatory to which, it seems, that the usual course is for the Clerk in Court to name two more Commissioners, one of whom must be struck by the adverse Clerk, and the Court must then be moved for a new commission, with the new Commissioner added to those who are living (*s*).

Second commission. Not issued without order. Where Commissioner dies.

If, by the fault of the party who has the carriage of the first commission, the other is put to unnecessary charges, the Court will order the Master to tax his costs, and, upon cause shewn, direct the party in fault to give security to pay them

Party put to unnecessary expense, to have his costs before a second commission.

(*p*) Beames's Ord. 190. Vide etiam ib. 111.

(*pp*) Hind. 237.

(*q*) Ante, 280.

(*qq*) Prac. Reg. 115.

(*r*) Ibid.

(*s*) Ibid.

By commission. before he has a second commission; and if he has the carriage of the second commission, to pay the costs upon that also, if he again fails (*t*).

Commission after insufficient answer. After an answer has been reported insufficient, no new commission shall be awarded for taking a second answer, unless it be by order on affidavits made of the defendant's inability to travel, or other good matter shewn, and first paying the costs of the insufficient answer (*x*). A new commission may, however, be issued, upon the consent of the plaintiff's Clerk in Court, which is seldom, if ever, refused.

Attachment to enforce return. It seems that, if the return of a commission be delayed, it may be hastened by motion. It seems, also, that an attachment and other process of contempt may issue against the Commissioners for not returning the commission with the answer, &c. (*y*). Where, however, it appeared that the omission to make a return arose from the circumstance of one of the plaintiff's Commissioners refusing to join with one of the defendant's, to take the answer, the attachment was discharged, upon payment of the ordinary fees, and a new commission was granted to different Commissioners named by the defendant (*z*).

Irregularities in, how remedied. Where any irregularity has taken place in the execution of a commission, the proper course appears to be, to move, after the return, that the commission and answer may be quashed, or that the answer may be taken off the file, &c. And so where any irregularity has taken place in taking or filing an answer, &c., sworn, before a Master in town, a motion may be made to take it off the file.

Joint answer by two defendants residing in town and country. It may be noticed here, that where a joint answer is put in by defendants, and one of them swears to it in town, and the other in the country, by commission, it is proper that the answer in the country should be taken first, and returned to the public office, where, being opened, it may remain till the other defendant attends to be sworn (*a*).

(*t*) Prac. Reg. 116.
(*x*) Beames's Ord. 183.
(*y*) Prac. Reg. 116.
(*z*) Ibid.
(*a*) 1 Smith's Ch. Pr. 251.

By commission.

Answer not a record till filed.

An answer is not strictly reputed such until filed, and that it ought not to be filed until the costs of contempt for not answering are paid. It is frequently, however, the practice to file the answer before the costs of contempt have been paid, and in such case the plaintiff must be careful not to take an office copy of the answer (*a*), or do any other act which may be construed into an acceptance of the answer, for, if he does, he will waive the contempt (*b*).

Waiver of contempt.

Answer found to be illegible.

Where a plaintiff's Clerk in Court, on attempting to take a copy of an answer, found it to be, in several parts, illegible, the plaintiff moved that it might be taken off the file, upon which the Lord Chancellor directed an affidavit to be made, describing the state of the parts which had become illegible, when last sworn; and an affidavit being filed accordingly, by which it appeared that the answer was legible when sworn, the motion was refused (*c*).

Sect. IV.

Of Exceptions to Answers.

In what cases they lie.

If, upon taking an office copy of the answer, the plaintiff finds that it contains scandalous or impertinent matter, or that it does not sufficiently answer the allegations and charges in the Bill, he must file exceptions to it.

For scandal and impertinence.

Exceptions are allegations in writing, stating the particular points or matters with respect to which the plaintiff considers the answer scandalous or impertinent, or those parts of the Bill to which he thinks there is not sufficient answer given.

Old practice to refer for scandal and impertinence without exceptions.

Under the old practice of the Court, an answer or plea which was scandalous or impertinent might, upon application to the Court, by motion of course, be referred to the Master to be looked into, and to report upon, without any formal exceptions in writing having been previously filed; but now, as we

(*a*) Ante, v. 1, 664.
(*b*) Ibid. 663.
(*c*) Attorney-General v. Mayor of Fowey, 3 Swanst. 184.

For scandal and impertinence.

Practice under the New Orders.

have seen (a), no order can be made for referring any pleading or other matter before the Court for scandal or impertinence, unless exceptions in writing, signed by Counsel, have been taken, describing the particular passages which are considered to be scandalous or impertinent, and delivered within six days before (b).

Nature of scandal and impertinence.

The nature of scandal and impertinence in pleadings has been before so fully gone into, in considering 'the matter of a Bill (c),' that it is now only necessary to inform the reader that the same rules which are there laid down for distinguishing scandal or impertinence, when comprised in a Bill, will equally apply to answers. The practice of the Court, also, with regard to exceptions to answers on account of scandal or impertinence is the same, *mutatis mutandis*, as that already described with respect to exceptions to Bills on the same grounds (d).

Co-defendant may refer answer for scandal.

We have seen before that an answer may be referred for scandal at the instance of a *co-defendant* (e). This, however, will not apply to case of impertinence only. No time appears, by the old practice of the Court, to have been limited within which a plaintiff was to obtain an order to refer an answer for impertinence, provided he obtained it before he replied to it; under the new practice, Lord Lyndhurst appears to have considered, that a reference for impertinence is too late, if made after the time when, by the order of the Court, the answer is to be deemed sufficient (f); but, in a more recent case, *Bradbury* v. *Booker* (g), the Vice-Chancellor, (Sir L. Shadwell,) refused to discharge an order, for such a reference, which had been made after the expiration of two months from the filing of the answer, on the ground that the 4th order applied to exceptions for insufficiency only.

No reference for impertinence after a reference for insufficiency.

If, however, a plaintiff wishes to refer an answer for insufficiency as well as for impertinence, he must procure the reference for impertinence first; for it has been decided, that a re-

(a) Ante, v. 1, 456.
(b) Orders, 1828, XI.
(c) Ante, v. 1, 451.
(d) Ante, v. 1, 456.
(e) Ibid. 460
(f) Jeffray v. M'Cabe, 1 R. & M. 739.
(g) 4 Sim. 235.

ference for impertinence can never be contemporaneous with exceptions for insufficiency (*h*); and that after a reference for insufficiency, or any other step taken in the cause, an answer cannot be referred for impertinence (*i*). And the plaintiff must not only procure the reference for impertinence, but he must obtain the Master's report upon it before he obtains an order to refer the answer for insufficiency; if he does otherwise, the reference for insufficiency will be considered a waiver of the reference for impertinence (*k*). The Master's report must, likewise, be obtained, so that the order for referring the answer for insufficiency may be procured and served before the time limited by the New Orders for referring an answer for insufficiency has expired; for if the time for referring an answer for insufficiency expires pending a reference for impertinence, it cannot afterwards be revived (*l*).

For scandal and impertinence.

Reference for insufficiency a waiver of previous reference for impertinence.

It is to be observed, that references for scandal may be procured at any stage of the cause (*n*); because the Court will always assist in a step which may serve to keep its records pure from scandal. And where a defendant became a bankrupt after putting in his answer, and the plaintiff, before the assignees were brought before the Court, obtained an order to refer the answer for scandal and impertinence, it was held, that the order was regularly obtained (*o*).

Reference for scandal at any time.

Where defendant has become bankrupt.

A reference of an answer for impertinence was, under the old practice of the Court, a good answer to a motion to dissolve an injunction obtained for want of an answer (*p*). It was, however, usual, when a reference for impertinence was shewn as cause against dissolving an injunction, to impose upon the plaintiff the condition of obtaining the Master's report within a limited time; that is, to draw up the order so that if the

Reference for impertinence good cause against dissolving injunction.

(*h*) Raphael v. Birdwood, 1 Swanst. 229.
(*i*) Pellew v. ——, 6 Ves. 458, arg.
(*k*) Ibid.
(*l*) Jeffray v. M'Cabe, 1 R. & M. 739.
(*n*) Ellison v. Burgess, 2 P. Wms. 312, notis. Vide ante, v. 1, 459.
(*o*) Booth v. Smith, 5 Sim. 639.
(*p*) Fisher v. Bayley, 12 Ves. 18, confirmed by Lord Eldon in Goodinge v. Woodhams, 14 Ves. 536. Vide etiam Thomas v. ——, ibid. 537, notis.

For scandal and impertinence.

Master's report was not obtained within the time limited, the injunction should be dissolved (*q*).

The time limited for this purpose appears generally to have been four days (*r*); but in *Goodinge* v. *Woodhams* (*s*), before referred to, Lord Eldon made it a week; and it seems, from that case, that it was not necessary, under the practice as it then stood, that the order of reference should have been obtained before the time for shewing cause against dissolving the injunction; it might have been obtained upon motion made at the time.

Whether filing exceptions will have the same effect as an order of reference under the old practice, *query?*

It does not appear that any alteration in the practice has taken place in consequence of the New Order rendering it necessary that, before an order for referring an answer for impertinence can be obtained, *exceptions* must be filed. It may, however, be suggested, that, as the New Order has placed references for impertinence upon nearly the same footing as references for insufficiency, the Court will in all probability carry the resemblance still further, and consider that, instead of the *order* referring the answer for impertinence being necessary as a cause against dissolving an injunction, the mere *filing of the exceptions* will be a good cause for that purpose, as it is in the case of exceptions for insufficiency.

Exceptions to Master's report no cause against dissolving injunction.

It is to be noticed, that, although an order of reference (or exceptions) for impertinence may be shewn as cause against dissolving an injunction, exceptions to the Master's report upon such a reference is not a ground for maintaining the injunction (*t*).

Effect of report upon injunction.

When a reference (or exceptions) for impertinence has been shewn as cause against dissolving an injunction, and the plaintiff put upon the usual term of procuring the report within a limited time, he must obtain the report within that time, otherwise his injunction will be gone. And even if the report is obtained within the time, if the Master reports the

(*q*) Dansey v. Browne, 4 Mad. 237.

(*r*) Ibid.

(*s*) Ubi supra.

(*t*) Corson v. Stirling, Coop. 93.

answer not impertinent, the injunction is, *ipso facto*, dissolved. In this respect the practice is the same upon references for impertinence as upon exceptions for insufficiency (*u*); in which case, as we shall hereafter see, the dissolution of the injunction is the consequence of the Master's report that the answer is sufficient, without motion (*x*).

For scandal and impertinence.

It is to be noticed, that, in *Dansey* v. *Browne* (*y*), where the plaintiff had failed in procuring the Master's report within the time limited, and the injunction was in consequence dissolved, and the Master afterwards reported that the answer was impertinent, a motion to revive the injunction was refused. It is right, however, to observe, that the decision in that case has been questioned, on the ground that it proceeded upon a supposition, that, after the report, the defendant would be at the mercy of the plaintiff, and could not move to dissolve the injunction till the plaintiff had expunged the impertinence; whereas it appears from a case in Mr. Cox's reports (*z*), which was not referred to in the argument, to have been determined that, although pending the reference, the defendant cannot move to dissolve, since, at that time, it cannot appear what part of the answer is to remain on the record, yet, as the Master's report points out the impertinent matter, it is not necessary to have it actually expunged before the order to dissolve is moved for (*a*).

Whether injunction can be revived upon report of impertinence, *query?*

When an order *nisi* to dissolve an injunction has been obtained, upon the coming-in of the answer in the usual way, and on the day of shewing cause against it, exceptions (or a reference) for impertinence, is the cause shewn, upon which the Master reports the answer to be impertinent, the order *nisi* is put an end to, and the defendant, if he wishes to have the injunction dissolved, must make another motion for that purpose (*b*).

Order *nisi* put an end to on report of impertinence,

(*u*) Raphael v. Birdwood, 1 Swanst. 228, 232.

(*x*) Vide post, Exceptions for Insufficiency.

(*y*) 4 Mad. 237.

(*z*) Kenny v. Barnwell, 2 Cox, 26.

(*a*) Eden on Injunctions, 98.

(*b*) Lacy v. Hornby, 2 V. & B. 291-3.

For scandal and impertinence, and a second order *nisi* must be obtained.

This, according to *Kenny* v. *Barnwell* (*c*), he may do immediately upon the Master's report being filed, without waiting till the impertinence has been expunged; and it seems, from that case, that the Court will, upon such application, grant a second order, *nisi*, and that upon the day for shewing cause against such second order, the plaintiff may shew exceptions for insufficiency as cause against dissolving the injunction.

But although a plaintiff may, upon such occasion, shew exceptions to the answer, for insufficiency, as cause against dissolving the injunction, he cannot, as we have seen, shew exceptions to the Master's report; and where, after the Master had made his report, certifying a small part only of the answer to be impertinent, the plaintiff himself excepted to the report, because the Master had not reported more to be impertinent, Lord Eldon held that the Master's report terminated the injunction, and imposed upon the plaintiff the necessity of excepting for insufficiency immediately (*d*).

Secus where defendant not in a situation to shew exceptions for cause.

The reason for allowing the defendant to obtain an order *nisi* only, upon the Master's report that his answer is impertinent, appears to be that the plaintiff may have an opportunity to file exceptions for insufficiency, before the injunction is dissolved. Where that reason ceases to exist, the order may be made absolute in the first instance; thus where an answer had been referred for impertinence, on the day of shewing cause against dissolving the injunction, and reported impertinent, whereupon the plaintiff without any motion having been made for dissolving the injunction, filed exceptions for insufficiency, which were overruled by the Master; the defendant was held entitled to move that the injunction should be dissolved absolutely in the first instance (*e*); because the reason why the order to dissolve the injunction is in the first instance made *nisi* only, is that the plaintiff may have an opportunity to determine whether, to shew cause upon the merits, or by exceptions for insufficiency; but, in the above

(*c*) Ubi supra.

(*d*) Raphael v. Birdwood, 1 Swanst. 228, 232.

(*e*) Lacy v. Hornby, ubi supra.

case, the question as to the sufficiency or insufficiency had already been determined, so that he could have no other cause to shew for sustaining the injunction, but merits confessed in the answer (*f*).

For scandal and impertinence.

Formerly, references of the same answer for impertinence and for insufficiency might be made to different Masters, which led to great inconvenience in practice. This, however, was remedied by an Order of the Court, dated the 10th of March, 1818, which directed all references of answers, whether for insufficiency or for scandal and impertinence, or for impertinence, made in the same cause, to be made to the same Master, and that, where answers of defendants have been referred for scandal and impertinence, or for impertinence, and the Court shall afterwards refer the same for insufficiency, the latter reference shall be made to the same Master as the former reference (*g*).

Reference for impertinence and for insufficiency to be made to the same Master.

For insufficiency.

If a plaintiff conceives an answer to be insufficient, he may take exceptions to it, stating such parts of the Bill as he conceives are not answered, and praying that the defendant may, in such respect, put in a full answer to the Bill (*h*). If, however, the answer is one which accompanies a plea, or a demurrer, to part of the Bill, he must, unless he intends to admit the validity of the plea or demurrer, wait till it has been argued; for his exceptions would operate as an admission of its validity (*i*). This rule, however, will not, as we have seen, apply to cases where the defendant demurs, or pleads to the relief only, and not to the discovery (*k*).

In what cases taken.

And where a demurrer and answer were put in, and the plaintiff, mistaking the practice, excepted to the answer before he set down the demurrer for argument, he was permitted, upon payment of costs, to withdraw his exceptions, without prejudice to his filing them again after the argument of the demurrer (*l*).

(*f*) Ibid.
(*g*) 1 Swanst. 128.
(*h*) Hind. 259.
(*i*) Ante, p. 77, 220.
(*k*) Ib.
(*l*) Boyd v. Mills, 13 Ves. 85.

For insufficiency.

Where answer is accompanied by demurrer,

If a plea or demurrer to the whole Bill is overruled, the defendant must answer without the plaintiff's being driven to except; but, where a partial plea or demurrer is overruled the plaintiff must except, as, since there is already an answer on the file, the defendant is not bound to answer further till exceptions have been taken (*m*).

A plaintiff may also, where a partial demurrer is allowed, except to the answer to that part of the Bill which is not covered by the demurrer. He must not, however, except to that part which is covered by the demurrer (*mm*).

—or plea.

In the case also of a plea, if the plea is accompanied by an answer as to part of the Bill, the plaintiff may, upon the allowance of the plea, except to the answer, as he must if a partial plea is overruled. And it is to be observed, that the rule that a plaintiff must except to the answer as insufficient, applies even where the plea or demurrer is accompanied by an answer as to a single fact, such as mere denial of combination (*n*). Where a plea is ordered to stand for an answer, with liberty to except, the plaintiff may of course file exceptions to the answer, or to that part of it to which he is, by the order, permitted to except (*o*). Where the plea is ordered to stand for an answer without liberty to except, expressly given, by the order, the plaintiff of course cannot except (*q*).

Do not lie to answer of Attorney-General,

The answer of the Attorney-General cannot, as we have seen, be excepted to for insufficiency (*r*); and the rule is the same with regard to the answers of infants (*s*).

—or of infant.

It has been before stated, that the reason why an infant's answer cannot be excepted to is, that he is not bound by it, but may put in a new one when he comes of age (*t*). The same reason, however, does not apply to the answers of lunatics or persons of weak intellects, put in by their committees or guardians. Such answers are, therefore, liable to exceptions.

Secus to answers of lunatics, &c.

To amended Bills.

Exceptions will lie to answers to amended Bills, as well as

(*m*) Ante, p. 95.
(*mm*) Taylor v. Bailey, 6 Law. J. (N. S.) 222.
(*n*) Cotes v. Turner, Bunb. 123.
(*o*) Ante, p. 127.
(*q*) Ibid.
(*r*) Ante, v. 1, 184.
(*s*) Ibid.
(*t*) Ante, v. 1, p. 236.

For insufficiency.

Cannot be taken as to matters contained in the original Bill.

to those put in to original Bills; but a plaintiff cannot, in excepting to an answer to an amended Bill, object that the defendant has not answered matters which are stated in the original Bill; and where a plaintiff takes no exception to the answer to the original Bill, he cannot except to the answer to the amended Bill upon a ground which would have applied equally to the original Bill (*u*). In *Glassington* v. *Thwaites* (*x*), this rule appears to have been departed from; but the circumstances of that case were peculiar. The defendant, instead of an answer to the original Bill, had put in what purported to be '*an answer and disclaimer,*' stating that he had parted with his share in the partnership of which an account was sought by the Bill, and disclaiming all interest therein; and the plaintiff appears to have acted under the erroneous impression that it was a case in which the defendant was entitled to disclaim, and that, as he had done so, he could not be called upon to make any further discovery, and amended his Bill for the purpose of shewing that he had another equity against the defendant (*y*). To the Bill thus amended the defendant put in another '*answer and disclaimer,*' but which was, in fact, no answer at all, to which the plaintiff excepted for insufficiency; and the Court, (as far as can be collected from the report of the case,) appears to have acted upon the principle, that, as the plaintiff had been misled by the form of the defendant's defence to the original Bill, (it having been entitled an answer and disclaimer, when, in fact, the defendant had no right to disclaim at all,) to omit taking exceptions to his answer to that Bill, he should not be prejudiced by such omission, and accordingly directed that the Master, in considering the exceptions taken by the plaintiff to 'the thing' called an answer and disclaimer to the amended Bill, should be at liberty to allow exceptions as to matters contained in the amended Bill, notwithstanding the same matters were stated in the original Bill, and no exceptions were taken to the answer to the original Bill.

The form of the order in the above case strongly confirms the rule in *Ovey* v. *Leighton*, above referred to (*z*). It

(*u*) Ovey v. Leighton, 2 S. & S. 235.

(*x*) 2 Russ. 458.

(*y*) Ante, p. 233, 235.

(*z*) Ubi supra.

For insufficiency.

Secus where plaintiff by amendments makes an entirely new case.

also shews that, notwithstanding the rule, circumstances may arise which may render an occasional departure from it requisite. Thus where, after a defendant had answered, the plaintiff amended his Bill, by stating an entirely new case, it was held, that exceptions would lie, although some of the interrogatories embraced in them were contained in the original Bill (*a*).

Unless defendant by his answer to amended Bill render his former answer insufficient.

And so where the original Bill required the defendants to state certain particulars as to some goods alleged to have been purchased by the defendants, (such as the persons from whom and by whom, and at what price, and in whose presence they were purchased,) and the defendants put in an answer in the terms of the Bill, whereupon the plaintiff amended the Bill, and the defendants availed themselves of the opportunity afforded by their being called upon to answer the amended Bill, to state that, since putting in their answer to the original Bill, they recollected that a parcel of the goods inquired after had been purchased of an individual not named in the former answer, but without stating from whom, or at what price, or in whose presence, &c., the same had been purchased, whereupon the plaintiff excepted to the answer for insufficiency, in not setting out those circumstances, the Court (of Exchequer) was of opinion, that the plaintiff ought not to be precluded, by the general rule above stated, from an opportunity of obtaining a sufficient answer as to the point excepted to; but held that, before delivering his exceptions, the plaintiff ought to have made a special application to the Court for leave to do so (*b*).

Amendment of Bill, a waiver of exceptions.

The reason of the rule that a plaintiff, if he does not except to the answer to the original Bill, cannot afterwards except to the answer to an amended Bill on the ground that the defendant has not answered matters which were contained in the original Bill, is, that, by amending his Bill, the plaintiff has admitted the answer to it to be sufficient. Upon the same ground it has been held, that where a plaintiff, after excepting to an answer, amends his Bill without waiting for the Master's report, he will be considered as having waived his excep-

(*a*) Mazarredo v. Maitland, 3 Mad. 66.

(*b*) Irvine v. Viana, M'Lel. & Y. 563.

tions (*c*). The principle, however, will not be applied to cases in which the amendment of the Bill extends only to the addition of another party, requiring no answer from the other defendants. And where a plaintiff, after answer to the original Bill, changed his name, and then amended his Bill by substituting his new name for his old one, and adding another defendant, and afterwards took exceptions to the answer, a motion to take the exceptions off the file was refused (*d*).

For insufficiency.

Secus where the amendment is formal and requires no answer.

Some doubt appears to be entertained, whether a plaintiff does not, by moving, upon admissions in an answer, either for payment of money into Court, or for the production of papers, waive his exceptions, if already taken, or his right to except, if he has not already excepted; and in consequence of this doubt a practice has obtained of making such motions '*without prejudice, &c.*' No case, however, is to be found in the books in which the plaintiff has been held to have waived his exceptions, or his right to except, by such a proceeding; and the Court of Exchequer have held, that they could not, by inserting the words 'without prejudice' into a common order, protect the party from the practical result (*e*).

Exceptions to an answer for insufficiency must be in writing (*f*), and care must be taken in framing them that they are properly intitled, otherwise they will be suppressed or taken off the file for irregularity; thus, where exceptions having been allowed to an answer, the plaintiff obtained the usual order 'that he might be at liberty to amend his Bill, and that the defendant might answer the amendments and exceptions at the same time,' and amended his Bill, whereupon the defendant put in a second answer, upon which the plaintiff took exceptions to the second answer, and intitled them 'Exceptions to the further answer to the original Bill and to the answer to the amended Bill,' the exceptions were held to be irregularly intitled, and ordered to be taken off the file, because new ex-

Exceptions for insufficiency must be in writing.

Form of.

(*c*) Ante, v. 1, 530.

(*d*) Taylor v. Wrench, 9 Ves. 315; Miller v. Wheatley, 1 Sim. 296.

(*e*) Phillips v. Stephenson, 11 Price, 733; *sed quere?* whether such an order would not be a *special* order.

(*f*) Beames's Ord. 78, 181.

For insufficiency.

ceptions cannot be taken to a further answer to an original Bill (*g*).

Formerly, exceptions for insufficiency appear to have set forth the tenor or scope of the Bill, and the substance of the answer, and then to have proceeded to point out particularly the points in which the answer was considered defective (*h*); but, according to the modern practice, the tenor of the Bill and substance of the answer are omitted, and the plaintiff proceeds at once to point out, specifically, the parts of the Bill or the interrogatories which are unanswered, by separate exceptions, applicable to each part. This is in compliance with Lord Bacon's Orders, which direct that 'no reference shall be made for insufficiency of an answer, without shewing some particular point of the defect, and not upon surmise of insufficiency in general' (*i*). And it has been held, that where a plaintiff complains that a particular interrogatory in his Bill has not been answered, he must state the interrogatory in the terms of it, and not throw upon the Court the trouble of determining whether the expressions of the exceptions are to be reconciled with the interrogatory (*k*). Where, however, an exception did not follow the words of the interrogatory, but the defendant had submitted to answer, and put in a further answer, which was referred upon the same exceptions, it was considered that he came too late with his objection to the form of the exceptions (*l*).

And so where a plaintiff, in his exceptions, went beyond the allegations in the Bill, and, upon a reference, the Master reported the answer insufficient, whereupon the defendant submitted to the report, and put in a further answer, which the Master also reported insufficient, the defendant, upon exceptions to the second report, was held to have precluded himself, by putting in a further answer, from objecting to the form of the exceptions. He ought to have excepted to the first report (*m*).

(*g*) Williams v. Davies, 1 S. & S. 426.

(*h*) Vide 1 Prax. Alm. 686. & seq.; Curs Canc. 137, and seq.

(*i*) Beames's Ord. 24.

(*k*) Hodgson v. Butterfield, 2 S. & S. 236.

(*l*) Ibid.

(*m*) Crisp. & Nevil. 1 Cha. Ca. 60.

For insufficiency. Cannot be good in part and bad in part.

It has been before stated, that in cases of exceptions for impertinence, one exception cannot be partially allowed; and, that, therefore, if part of an exception be good, and the rest bad, the whole exception must be overruled (*n*). This, however, is not the case with regard to exceptions for insufficiency, which may be allowed in part and overruled as to part (*o*).

In what cases they may be amended.

Care must be taken, in drawing exceptions, that no mistakes happen therein, for after they have been delivered no new exception can regularly be added (*p*). Cases, however, have occurred, where the amendment of exceptions has been permitted on the ground of mistake (*q*), as where the plaintiff's Solicitor, for the purpose of instructing his Counsel in drawing the exceptions, sent him, by mistake, the original draft of the Bill, instead of another draft from which the Bill was engrossed which differed materially, and the mistake was not discovered till it was too late to rectify it (*r*). In *Northcote* v. *Northcote* (*s*), it is stated, that liberty was given to amend exceptions after arguing them; it does not, however, appear upon what ground such liberty was given.

Must be signed by Counsel.

Exceptions for insufficiency as well as those for impertinence must have the signature of Counsel, though there is no positive order requiring it (*t*), and a set of such exceptions not signed by Counsel, were for that reason taken off the file, although the defendant had taken an office copy of them, and the plaintiff had obtained an order of reference (*u*).

How delivered or filed.

The exceptions having been drawn or perused, and signed by Counsel and engrossed *upon paper*, are left with the plaintiff's Clerk in Court, who delivers them over to the defendant's Clerk in Court, first marking thereon the day of the delivery of them. This is sometimes termed *filing* exceptions (*x*), but at other times, and more correctly, *delivering* them.

(*n*) Ante v. 1, 457.
(*o*) Per Lord Hardwicke, in E. I. Company v. Campbel, 1 Ves. 247.
(*p*) Partridge v. Haycraft, 11 Ves. 575.
(*q*) Dolder v. Bank of England, 10 Ves. 284.
(*r*) Bancroft v. Wentworth, cited ib. 285, n.
(*s*) 1 Dick. 22.
(*t*) Yates v. Hardy, Jac. 223.
(*u*) Ibid.
(*x*) 1 Turn. & V. 784.

For insufficiency.

It is to be observed, that if defendants answer separately exceptions must be taken to each answer (*y*), and if a joint answer is put in, and one dies, exceptions may be taken to the answer as to the survivor only (*z*).

Must be delivered within two months.

Under the old practice, the plaintiff ought regularly to have delivered exceptions for insufficiency, within a certain time, after the filing of the answer, but he might, nevertheless, obviate the strictness of the practice by procuring an order authorizing the delivery of the exceptions *nunc pro tunc*. This order was usually granted as a matter of course, and the practice appears to have grown up of allowing the plaintiff to obtain such an order at any time within two terms, and the vacations following such terms (*b*), but the Commisioners for inquiring into the Practice of the Court conceiving that the necessity for obtaining an order to deliver the exceptions *nunc pro tunc* entailed an useless expense upon the plaintiff, and that a time might be fixed within which exceptions might be delivered which would be adapted to all cases, made a proposition in their report (*c*), which was afterwards embodied into Lord Lyndhurst's Orders (*d*); whereby it is provided that in all cases, whether the defendant's answer be filed in term time or in vacation, the plaintiff shall be allowed two months to deliver exceptions to such answer, but, if the exceptions be not delivered within the two months, the answer shall from thenceforth be deemed sufficient; and the plaintiff shall have no order to deliver exceptions *nunc pro tunc*.

Cannot be delivered *nunc pro tunc*.

— or after replication.

A plaintiff must take care to deliver his exceptions before he files his replication; for, by replying, he admits the answer to be sufficient (*e*). In some cases, however, the Court will permit a replication to be withdrawn and exceptions to be taken.

When an injunction has been obtained for want of an answer, the plaintiff should, if possible, deliver his exceptions to

(*y*) Sydolph v. Monkston, 2 Dick. 609.

(*z*) Lord Herbert v. Pusey, 1 Dick. 255.

(*b*) Cha. Rep. Expl. paper, 71 prop. 9.

(*c*) Chan. Rep. 40. prop. 9.

(*d*) Ord. 1828, IV.

(*e*) Prac. Reg. 376.

the answer, before the defendant can have an opportunity of getting an order *nisi* to dissolve the injunction (*f*); as by so doing, he will preclude the defendant from procuring such an order till the exceptions have been disposed of; and if, after exceptions have been delivered, the defendant obtains an order to dissolve an injunction *nisi*, such order may be discharged for irregularity (*g*).

For insufficiency.

In injunction, cases may be shewn for cause although not delivered,

Where an order has been made to dissolve an injunction *nisi*, upon the coming in of the answer, the plaintiff, if he means to shew exceptions for cause, need not deliver them before the day for shewing cause arrives, as the Court will allow exceptions to be shewn for cause, even where none are actually on the file, upon the plaintiff's undertaking to file them immediately (*h*); in fact, he is entitled to the whole of the day appointed for shewing cause to deliver his exceptions (*i*).

but not after undertaking to shew merits as cause.

It is to be observed, that, after a plaintiff has undertaken to shew merits for cause against dissolving an injunction, he cannot afterwards shew exceptions for cause (*k*).

And where a plaintiff has shewn exceptions for cause against dissolving the injunction, and the answer is reported sufficient, he cannot afterwards move to revive the injunction upon merits confessed in that answer (*l*).

If a plaintiff, after an order *nisi* has been obtained to dissolve an injunction, moves to enlarge the time for shewing cause, he must do so upon the condition of taking the answer as it is, and he cannot afterwards shew exceptions for cause (*m*).

Time given to the defendant to consider as to further answer.

Where exceptions are taken to a first answer, a defendant has eight days, after they have been delivered, to consider whether he will put in a further answer or not (*n*), before the expiration of which time, the plaintiff ought not to move for

(*f*) Hind. 260.

(*g*) Williams v. Davis, 1 S. & S. 262.

(*h*) Vipan v. Mortlock, 2 Mer. 476-9.

(*i*) Pinheiro v. Porter, 3 Swanst. 362 n.

(*k*) Harcourt v. Ramsbottom, 3 Swanst. 362; Pinheiro v. Porter ib. n.

(*l*) Peyto v. Hudson, 3 Swanst. 363 n.

(*m*) Pinheiro v. Porter, ubi supra.

(*n*) Hind. 260.

For insufficiency.

Reference *instanter* only in injunction cases where no injunction has been issued.

a reference of them to the Master (*o*), unless where the Bill prays an injunction, and the answer has been put in in sufficient time to prevent the injunction from issuing; in which case the plaintiff is entitled to have the exceptions referred *instanter* (*p*). The title of the plaintiff to refer the exceptions *instanter*, so as to deprive the defendant of his ordinary right to put in an answer within eight days, without going before the Master, is given to him to protect him from delay in those cases where, upon the allowance of the exceptions, he would be entitled to an injunction; but where the plaintiff is in actual possession of an injunction, the special reason for the reference *instanter* has no application; and an order to refer exceptions *instanter* will be irregular (*q*), unless the plaintiff has shewn his exceptions for cause against dissolving the injunction; in which case, as the dissolution of the injunction is only postponed upon the condition that the plaintiff shall procure the Master's report in four days, and that upon his failing to do so the injunction shall be dissolved, it is necessary that he should have an immediate order of reference, to enable him to get the report within the limited time. In injunction cases, therefore, the plaintiff may procure an order to refer the exceptions to the Master on the same day that he shews cause against dissolving the injunction, even though the eight days from the delivery of the exceptions should not have elapsed.

Secus where an injunction has been issued.

Unless plaintiff has shewn exceptions for cause.

Proceeding where a defendant submits to exceptions.

When the eight days allowed to a defendant for considering whether he will put in a further answer, are elapsed, the plaintiff's Clerk in Court usually calls for the defendant's answer. The defendant must then determine whether he will submit to answer the exceptions or not. If he submits to answer, he must pay to the plaintiff 20*s*. costs. Under the old practice, the defendant submitting to answer exceptions, if residing in London or within twenty miles of it, was entitled to an order for a month's time to to put in his answer; or, if he resided above twenty miles from London, he might obtain, by motion or petition, an order of course for a

Time for answering.

(*o*) Hind. 261.

(*p*) Candler v. Partington, Mad. and Geld. 102.

(*q*) Ibid.

dedimus to take his answer, and six week's time to return it, and generally a second, or even a third, order for time might in either case have been obtained (*r*); but now, by Lord Brougham's Orders (*s*), where a defendant, who is not in contempt, or has not entered his appearance with the Registrar in the manner thereinafter mentioned, (that is, upon obtaining from the Master an order for further time to answer (*t*),) submits to answer exceptions taken to a first answer before any order to refer the same has been obtained, he shall be allowed, as of course, *four weeks* in a town cause, and *six weeks* in a country cause, to put in a further answer thereto.

For insufficiency. granted without order.

It is to be observed, that, in order to entitle the defendant to such time as a matter of course, it is necessary that the submission to answer should have been made before an order for referring the exceptions to the Master has been obtained and served. Where an order of reference has been obtained *and served* prior to such submission, then the time to be allowed to the defendant to put in a further answer must be fixed by the Master to whom the reference has been made (*u*).

Unless exceptions have been referred.

It is also to be noticed, that the above rule only applies to cases in which the defendant is not already in contempt, or has not entered his appearance with the registrar. Where the defendant is in either of those predicaments, he must, if he submits to the exceptions, put in his answer immediately; otherwise he will be liable to have the process of contempt resumed against him.

Or defendant is in contempt, or has appeared with the Registrar.

Where, upon a defendant submitting to answer exceptions, the plaintiff obtains an order that he may be at liberty to amend his Bill, and that the defendant may answer the amendments and exceptions at the same time, the defendant will be entitled to the time usually allowed to answer amended Bills to put in his answer to the exceptions and amendments (*x*); and so he will if the Master, upon reference, reports the answer insufficient, and the plaintiff obtains a similar order to amend (*y*).

Where plaintiff amends, and obtains an order that defendant may answer amendments and exceptions.

(*r*) Hind. 261.
(*s*) Ord. 1833, XVIII.
(*t*) Ante, p. 274.
(*u*) Ibid.
(*x*) Hind. 262.
(*y*) Fosbrooke v. Balguy, 1 R. & M. 624.

For insufficiency.

Where the answers of two or more defendants are excepted to, they cannot be embraced in one order of reference(*z*). But where a joint answer is excepted to, and one of the defendants dies, the exceptions may be referred as to the answer of the surviving defendant only(*a*).

Rule, where one or more of several defendants submit.

Where two or more defendants put in a joint and several answer, which is referred for insufficiency, and one or more of them submit to the exceptions, the others may have them argued(*b*). And it is said, that where there are two defendants to a Bill, and one of them puts in an answer, which is reported insufficient, and the Master's report is confirmed by the Court on exceptions, if the other defendant afterwards puts in the like insufficient answer, the Court, upon application, will, for the sake of avoiding delay, judge of the insufficiency of this answer without sending it to a Master (*c*).

Where, after answer of one defendant declared insufficient by the Court upon exceptions to report.

Order to refer exceptions.

If the defendant, upon the expiration of the eight days, does not submit to answer the exceptions, the plaintiff must procure an order referring it to a Master to look into the Bill, answer, and exceptions, and to report to the Court whether the answer be sufficient in the parts excepted to, or not. Under the old practice, the party excepting was restricted to no particular time to get it referred; the consequence was, that unless the plaintiff was driven to obtain such order for the purpose of sustaining an injunction, the *onus* of getting rid of the exceptions was thrown upon the defendant, who, in such cases, must, if no order of reference had been obtained, have moved to refer them; or, if an order had been obtained, and the plaintiff omitted to prosecute it, must himself have proceeded under it *exparte* (*e*). The practice, however, has, in this respect, been altered by Lord Lyndhurst's Orders(*f*). According to that order, where exceptions taken to an answer are not submitted to, the plaintiff may, at the expiration of

(*z*) Allanson v. Moorsom, 2 S. & S. 478.

(*a*) Lord Herbert v. Pusey, 1 Dick. 255.

(*b*) Hind. 268.

(*c*) West v. Lord Delaware, 1 Vern. 74.

(*e*) Hind. 262; Prac. Reg. 173.

(*f*) Ord. 1828, V.

eight days after the exceptions are delivered, but not before, unless in injunction causes, refer such answer for insufficiency; and if he do not refer the same for insufficiency within the next six days, he shall be considered as having abandoned the exceptions; in which case, such answer shall be thenceforth deemed sufficient.

For insufficiency. Must be obtained by plaintiff within six days,

It is to be observed, that the duty of *serving* the order of reference is included in the duty of *referring* the answer, imposed upon the plaintiff by the fifth Order; and that where a plaintiff had obtained an order to refer his exceptions within the six days mentioned in the General Order, but had omitted to serve it till after the six days had expired, the Court held, that he had abandoned his exceptions, and ordered the report of the Master made upon those exceptions to be taken off the file for irregularity (*g*). It seems, also, that a plaintiff is not relieved from the necessity of serving the order of reference by immediately carrying the order into the Master's office (*h*).

And *served* upon the defendant.

By the 19th of Lord Lyndhurst's Orders, as amended by Lord Brougham (*i*), the time which occurs between the *last seal after Trinity Term* and *the first seal before Michaelmas Term*, and between the *last seal after Michaelmas Term* and the *first seal before Hilary Term*, shall not be reckoned in the computation of time which is allowed to any party for amending any Bill (*k*), or for filing, delivering, or referring exceptions to any answer, or for obtaining the Master's report upon any exceptions (*l*).

Vacations before Michaelmas and Hilary Terms not to be reckoned.

The order for referring exceptions to the Master having been drawn up, passed, and *served* upon the defendant's Clerk in Court, a fair copy of the exceptions must be left at the Master's office, and the Master's clerk will then grant a warrant *on leaving* the exceptions, and another warrant *to proceed*(*m*). Copies of these warrants must be served on the ad-

Proceedings before the Master.

(*g*) Taylor v. Harrison, 1 M. & Craig, 274.

(*h*) Attorney-General v. Clack, 1 M. & Craig, 367.

(*i*) Ord. 1831, XIX.

(*k*) Ante, v. 1, p. 535.

(*l*) Vide post. Sect. 8.

(*m*) Hind. 262.

For insufficiency.

Warrants to attend.

verse Clerk in Court or his agent, and each warrant should be underwritten with the matter to be proceeded upon; and the defendant's Solicitor must bespeak a copy of the exceptions left at the Master's office, or his attendance will not be allowed (*n*).

Service of,

The service of all warrants is upon the adverse Clerk in Court personally, or on his agent at his seat in the Six Clerks' Office, by leaving a copy and producing the original; and in general, an interval of a whole day, (Sunday not being reckoned as one,) between the day of service and the day of attendance, is allowed.

in injunction cases.

In an injunction cause, however, where exceptions to the defendant's answer have been shewn as cause against dissolving the injunction, and the plaintiff is to procure the Master's report in four days, so that it is necessary for the plaintiff to proceed with all possible dispatch, a much less interval is allowed between the service of a warrant and the attendance upon it; and service of a warrant in the morning will be good service for the evening of the same day (*o*).

It is to be observed, however, that, when a plaintiff has undertaken to procure the Master's report upon his exceptions in four days, in default of which the injunction is to be dissolved, the time is frequently enlarged by courtesy amongst the Solicitors (*p*); in which case it is generally arranged, that the Master's report shall bear date within the four days (*q*). Where the Master to whom the exceptions were referred was prevented by illness from proceeding with the reference, the Vice-Chancellor, upon application, extended the time for procuring the report for a further space of four days (*r*).

Argument of exceptions.

The time appointed by the warrant being arrived, the Solicitors on each side (and Counsel, if any are employed,) attend; when the order of reference is produced, and the Master, pursuant to the order, proceeds to look into the office copies of the Bill and answers and the exceptions, and to hear the arguments on each side.

Where defendant does not attend.

It is to be observed, that, if the defen-

(*n*) Hind. 263.
(*o*) Ibid. 264.
(*p*) Bishton v. Birch, 2 V. & B. 40-42.
(*q*) Hind. 264.
(*r*) Davenport v. Whitmore, 6 Law. J. N. S. 62.

For insufficiency.

dant's Solicitor or Counsel does not attend, the Master may proceed, upon the matter of the reference *exparte*, notwithstanding it is only the first warrant, the 59th order having directed that every warrant for attendance before a Master shall be considered as peremptory (*s*). Before he does so, however, the person who served the warrant must make an affidavit of its service upon the defendant's Clerk in Court (*t*).

Master to consider the relevancy of the question.

By the 74th Order, the Master, in deciding on the sufficiency or insufficiency of any answer or examination, is to take into consideration the relevancy or materiality of the statement or question referred to (*u*).

Course where point of law is insisted upon.

In some cases, where a defendant has not answered, and insists upon some particular right or principle upon which he declines to answer, the Masters generally report according to the exceptions, because they will not take upon themselves to judge how far the defendant ought or ought not to answer, but leave it to be determined by the Court upon exceptions to their report (*x*).

Master must give his judgment upon each exception.

It appears to have been formerly the practice in some of the Masters' offices, upon references for insufficiency, for the Master to report an answer insufficient generally upon the plaintiff establishing one exception, without entering into the other exceptions (*y*); but in *Rowe* v. *Gudgeon* (*z*), Lord Eldon expressed his disapprobation of this practice, and held, that, on the discussion of the exceptions, the Master's judgment ought to be given upon each. No General Order appears to have been made in consequence of that decision to vary the old practice; but the course of proceeding has ever since been, generally, in conformity with Lord Eldon's opinion; and in *Agar* v. *Gurney* (*a*), Sir Thomas Plumer, V. C., said, that his opinion was, that the suitor has a right to the Master's judgment upon each of the exceptions.

Master's report.

The Master, having heard the arguments, and looked into the Bill, answers, and exceptions, certifies his opinion as to the

(*s*) Ord. 1828, LIX.
(*t*) Hind. 263.
(*u*) Ord. 1828.
(*x*) For. Rom. 106.
(*y*) For. Rom. 104.
(*z*) 1 V. & B. 331.
(*a*) 2 Mad. 389.

For insufficiency.

Must fix the time to be allowed for putting in answer.

sufficiency or insufficiency of the answer in a report to the Court. And if the Master finds the answer insufficient in any of the points excepted to, he must, besides reporting upon the exceptions, fix the time to be allowed for putting in a further answer, and specify the same in his report, from the date whereof such time shall run (*b*).

May certify by whom the costs are to be paid.

The Master may also in his report, if he shall think fit, certify by whom, and in what proportions (if any,) the costs of the exceptions and of the reference thereon ought to be borne, in order that, upon the taxation of the general costs of the cause under the 28th Order of the 3d of April, 1828, the costs may be taxed and allowed to either party accordingly (*c*).

Report must be obtained within a fortnight,

unless the Master shall certify that further time is necessary.

By Lord Lyndhurst's Orders (*d*), it is provided that when any order is obtained for referring an answer for insufficiency, the order is to be considered as abandoned, unless the party obtaining the order shall procure the Master's report within a fortnight from the date of such order, or unless the Master shall, within the fortnight, certify that a further time, to be stated in his certificate, is necessary, in order to enable him to make a satisfactory report; in which case, the order shall be considered as abandoned if the report be not obtained within the further time so stated. And it is to be observed, that, by the same order, the answer is to be deemed sufficient from the time when the order for reference is to be considered as abandoned.

With reference to the last-mentioned order it may be here noticed that, in a recent case, the Vice Chancellor, Sir L. Shadwell, has determined that the Master has only power under it to enlarge the time for making his report *once*, except with the consent of both parties, but that he may do so in respect of his own convenience without the application of either party (*e*). His Honour has also held, that this, as well as other orders of the Court, is to be considered as laying down general rules, but not as being so imperative that it can, under no circumstances, be departed from; and, therefore, where the time for making the report had passed, and it was esta-

(*b*) Ord. 1828, VIII.
(*c*) Ord 1833, XIX.
(*d*) Ord. 1828. XII.
(*e*) Watkins v. Redman, Michaelmas Term, 1837.

blished by affidavit that the omission to procure the Master's certificate that further time was necessary to enable him to make his report, arose from inadvertence, his Honour extended the time for another fortnight on the plaintiff paying the costs of the application (*f*).

For insufficiency.

It has been before stated, that when exceptions are shewn for cause against dissolving an injunction, the plaintiff is, by the order made upon that occasion, put upon terms to procure the Master's report upon the exceptions, within four days, in default of which the injunction will be dissolved; that order, however, will not preclude the plaintiff, if he cannot procure the report within that time, from proceeding with the reference during the remainder of the period limited by the twelfth order, or such other period as the Master, in pursuance of that order, may certify to be necessary; and if then the Master should report the answer to be insufficient in any of the points excepted to, the plaintiff may move to revive the injunction.

When answer is reported insufficient after injunction dissolved.

Injunction may be revived.

The certificate or report of the Master, when signed by the Master, is taken away by the party in whose favour it is made, and carried to the Report Office to be filed. This report requires no confirmation, and consequently no objection to it can be brought into the Master's office (*g*).

Master's report requires no confirmation;

It is to be observed, that before any proceeding is taken upon the Master's report upon exceptions, it is necessary that the report should be actually filed (*h*), and therefore, where a plaintiff, after the Master had made his report upon exceptions, but before it was filed, obtained an order for an injunction, the injunction was held to be irregular (*i*); and so if a plaintiff obtains an order for leave to amend, and that the defendant may answer the amendments and exceptions at the same time, before the Master's report allowing the exceptions has been filed, it will be discharged (*k*). It seems scarcely necessary to add, that if such an order be obtained before the report has been *signed*, it will be irregular (*l*).

but must be filed before any proceedings are taken upon it.

(*f*) Burrell v. Nicholson, 6 Sim. 212.

(*g*) Hind. 264.

(*h*) Beames's Ord. 292.

(*i*) Wynne v. Jackson, 2 S. & S. 226.

(*k*) Rushton v. Troughton, 2 Sim. 33.

(*l*) Job v. Barker, 2 Swanst. 255, for more as to the effect of this order, vide ante, v. 1, p. 528.

For insufficiency.

If answer is reported insufficient, injunction is dissolved *ipso facto;*

It is to be remarked, that the undertaking entered into by the plaintiff, in an injunction case, to obtain the Master's report upon the insufficiency of the answer within four days, has been construed to mean, not only that the plaintiff shall procure a report within the time limited, but that such report shall be that the answer is insufficient (*ll*); the consequence of which is, that if the Master reports the answer to be sufficient, the condition is not performed, and the injunction is, *ipso facto*, dissolved, without further motion (*m*); and an exception to the Master's report will not uphold it (*n*). The dissolution of the common injunction also necessarily draws with it that of an order to extend it to stay trial (*o*).

as also the order to extend it to stay trial.

Injunction not upheld by exceptions to report;

As the injunction is dissolved upon the Master's report of the insufficiency of the answer, so that he cannot be upheld by the plaintiffs taking exceptions to the Master's report, neither can it be restored, upon motion, till such exceptions have been allowed. And where the Master had reported the answer insufficient, and exceptions were taken to the Master's report, upon hearing which, the Court was of opinion that the answer was sufficient, whereupon the plaintiff petitioned for a rehearing, the Court refused to revive the injunction till the rehearing had taken place (*p*). Where, however, an injunction has been dissolved in consequence of the Master having reported the answer sufficient, and the Court, upon exceptions to the Master's report, is of opinion that the answer is insufficient, the plaintiff may move to revive the injunction (*q*).

but may be revived, if report overruled.

Exceptions submitted to or allowed must be answered within the limited time.

Where, upon exceptions being taken to an answer, the defendant submits to the exceptions before reference, or the Master, upon the exceptions being referred, reports the answer insufficient, the defendant, if the plaintiff does not obtain an order to amend his Bill, and that the amendments and exceptions may be answered at the same time, must put in his

(*ll*) Botham v. Clark, 2 Cox. 428.

(*m*) Scott v. Mackintosh, 1 V. & B. 505; Hutchinson v. Markham, 2 Mad. 355; Peyto v. Hudson, cited ib.

(*n*) Vipan v. Mortlock, 2 Mer. 479.

(*o*) Bishton v. Birch, 2 V. & B. 40.

(*p*) Scott v. Mackintosh, 1 V. & B. 503.

(*q*) Botham v. Clark, 2 Cox. 428.

answer in the first case within the time limited by the general order, or, in the second case, within the period assigned for that purpose by the Master's report; and a *subpœna* to put in a better answer is not now, as it was formerly, necessary to compel him to do so(r). If the defendant fails in putting in his further answer within the time limited, he will be in contempt, and the usual process of contempt for want of an answer may be issued against him; or, if any process has been already issued, the plaintiff will be entitled to resume it at the point where it left off(s).

For insufficiency.

No subpœna for a better answer necessary.

It is to be observed, that if, after an answer has been reported insufficient and the time fixed by the Master for putting in a further answer, the defendant finds it necessary to obtain an extension of that time, he must do so by application to the Master, under the 3 and 4 Wm. 4. c. 94, s. 13, taking care that such application is made before the time fixed in the report has expired, otherwise he will be in contempt under the operation of the eighth Order and cannot be heard to make such application (t).

Extension of time, how obtained.

If the defendant, after exceptions allowed or submitted to, puts in a further answer, which the plaintiff considers insufficient, the plaintiff may move to refer the further answer to the Master, *instanter*(u); and if he does not do so within three weeks from the filing of the answer, such answer will from thenceforth be deemed sufficient(x).

In the case of a second answer, no new exceptions can be taken unless the Bill has been amended, (in which case, as we shall see presently, new exceptions may be taken for insufficiency in the answer so far as it is applicable to the amendments,) but the reference to the Master must be upon the old exceptions(y).

Second answer must be referred on the old exceptions.

If, upon referring the further answer upon the old exceptions, it is again reported insufficient in any of the points excepted to, the defendant may put in a third answer, which may, if

Reference of third answer must be upon the old exceptions.

(r) Ord. 1828, VIII.
(s) Ante, v. 1, 661.
(t) Wheat v. Graham, 5 Sim. 570.
(u) Hind. 261.
(x) Ord VI. 23 Nov. 1831
(y) Partridge v. Haycraft, 11 Ves. 570.

For insufficiency.

necessary, be again referred upon the old exceptions, *instanter*. The order for such reference must, at all events, be procured and served within the same period of three weeks from the filing of the third answer.

If second or third answer is referred the particular exceptions must be pointed out.

By another order it is directed (*z*), that if the plaintiff refers a defendant's second or third answer for insufficiency, upon the old exceptions, the particular exception or exceptions to which he requires a further answer shall be stated in the order. This regulation was suggested by the Commissioners for inquiring into the Practice of the Court, in order to afford the defendant the opportunity of avoiding the expense and delay of a reference, by submitting at once to put in an answer to those particular exceptions which his opponent should thus point out as not being answered (*a*).

If the Bill has been amended new exceptions may be taken as to amendments.

It has been stated, that, although a further answer can only be referred to the Master upon the old exceptions, the plaintiff may, if the Bill has been amended, deliver new exceptions applying to any part of the amendments which he does not think sufficiently answered; such new exceptions, however, must not extend to any matter which was contained in the Bill as originally filed (*b*).

When this has been the case, the plaintiff must go before the Master upon the old exceptions, as they apply to the original Bill, and upon new exceptions as to the new matter introduced by the amendments (*c*). In such case, however, he may have the Master's judgment upon the answer to the amendments with reference to such parts of the original Bill as applies to them. If the original words apply to the amendments, the Master, in considering whether the answer is sufficient as to the amendments, must take into his consideration every thing in the amended Bill that gives a construction to the amendments (*d*).

Proceeding upon reference of second or third answer.

The proceedings before a Master upon a second or third reference for insufficiency are precisely the same as upon a first; the Master, however, in deciding upon the exceptions,

(*z*) Ord. 1828, VII.

(*a*) Cha. Rep. Expl. pa. . 2, prop. 12, 13.

(*b*) Partridge v. Haycraft, 11 Ves. 570.

(*c*) Ibid.

(*d*) Per Lord Eldon, ibid.

is not to look at the second or third answer only, but he must look at it in connection with the preceding answer (*e*).

For insufficiency.

Report.

If the Master, upon looking into the answers in the manner above stated, shall still be of opinion that no sufficient answer is given to the matter originally excepted to, he must report accordingly.

Upon second insufficient answer, must fix the time for further answer *Secus* in case of third answer.

If it be a second answer only which has been referred to the Master, he must fix the time for putting in a further answer, and specify the same in his report, from the date whereof such time shall run. If the reference be of a third answer, such an addition to the report seems to be unnecessary, the consequence resulting from a third answer reported insufficient being, as we shall presently see, different from those resulting from a second insufficient answer.

Proceeding upon third insufficient answer.

By Lord Lyndhurst's Orders (*f*) it is provided, that, upon a *third* answer being reported insufficient, the defendant shall be examined upon interrogatories to the points reported insufficient, and shall *stand committed* until such defendant shall have perfectly answered such interrogatories, and shall pay, in addition to the 4*l.* costs heretofore paid, such further costs as the Court shall think fit to award.

Under the old practice.

It appears that, in Lord Bacon's time, a defendant was allowed to put in four insufficient answers, and it was not until the fourth had been certified insufficient that he was to be committed, 'until he had made perfect answer, and to be examined upon interrogatories touching the points defective in his answer (*g*).' Lord Clarendon's Orders, made about the year 1661 (*h*), repeat the same rule. A general order appears to have been made on the 30th of April, 1700, authorizing the committing the defendant on his examination upon interrogatories, &c., upon his putting in a third insufficient answer; but this order appears never to have been acted upon, and the practice was uniformly consistent with the rules laid down in the orders of Lord Bacon and Lord Clarendon (*i*), till the pro-

(*e*) Farquharson v. Balfour, 1 Turn. & Russ. 189.
(*f*) Ord. 1828, X.
(*g*) Beames's Ord. 28.
(*h*) Ibid. 183.
(*i*) Cha. Rep. Expl pa. 73, prop. 16; Farquharson v. Balfour, 1 Turn. & Russ. 184.

For insufficiency.

Under New Orders.

mulgation of Lord Lyndhurst's Orders, when the order was repromulgated in the form above mentioned. The effect of this order is to affix the same consequences to a *third* insufficient answer as, under the Old Orders, resulted from a *fourth.*

Defendant in custody entitled to immediate discharge on putting in second and third answers.

It has been before stated (*k*), that, where process of contempt has been issued against a defendant for want of an answer, he is entitled to be discharged from his contempt immediately upon putting in his answer and paying or tendering the costs of contempt; and that where a defendant is in actual custody upon process of contempt, the Court will not detain him in custody till the sufficiency of his answer has been decided upon. This lenity of the Court, however, did not, under the old practice, extend beyond the fourth answer, and is now limited to the third answer. Upon putting in that answer, and paying or tendering the costs of his contempt, the defendant is, as we have seen, entitled to his immediate discharge (*l*). If, however, upon the third answer being referred upon the old exceptions, the Master report it insufficient in any of the points excepted to, the plaintiff may, upon the report being filed, move that the defendant may be examined before the Master, upon interrogatories, to the points wherein his answer is reported insufficient, and that he may stand committed to her Majesty's prison of the Fleet until he shall perfectly answer the interrogatories, and the Court make further order to the contrary (*ll*).

Upon third answer reported insufficient, defendant to be committed till he answers interrogatories.

The effect of the order made upon this motion is, that the defendant is *ipso facto* committed to the custody of the Warden of the Fleet Prison as a contemnor of the Court, until he shall perfectly answer the interrogatories, &c. It seems that, in order to save the defendant from the consequences of a *third* answer being reported insufficient, the Court will, upon his putting in a fourth answer, direct the Master to suspend his report upon the reference of the third answer (*m*).

(*k*) Ante, v. 1, p. 661.

(*l*) Bailey v. Bailey, 11 Ves. 151; Balfour v. Farquharson, 1 S. & S. 72.

(*ll*) Farquharson v. Balfour, 1 Turn. & Russ. 184. Vide etiam Gower v. Lady Baltinglass, 1 Cha. Ca. 66; and Turn. & Russ. 193, *notis*; where a course somewhat different from that adopted in Farquharson v. Balfour was pursued.

(*m*) Russell v. Dight, V. C. Jan. 16, 1834, Cooke's Orders, p. 7.

For insufficiency.

Defendant being an old man, not committed to close custody.

The order of committal being entered and passed, a copy of it must be delivered to the Tipstaff of the Court, who is the Deputy of the Warden of the Fleet, and will proceed to arrest the defendant. If the defendant is arrested, he should, in strictness, be taken to the Fleet Prison; but in *Farquharson* v. *Balfour* (n), the defendant, being a gentleman advanced in years, was, by the order of the Court, allowed to remain at an hotel in the neighbourhood of Lincoln's Inn, in the custody of the Tipstaff, till his examination should be completed.

Execution of order not suspended by exceptions to report;

but if defendant render himself amenable, exceptions will be heard in Court.

It is to be noticed, that, in the above case, before the defendant could be taken into custody under the order, exceptions were taken, on his behalf, to the Master's report, and that, upon application to the Court to hear them *instanter*, and in the mean time to discontinue the process of contempt, the Court refused the application, unless the defendant would render himself amenable to the process: whereupon the defendant rendered himself amenable by appearing upon the floor of the Court; and the exceptions to the Master's report were then called on for argument, and overruled (o).

After plea overruled, defendant may put in two insufficient answers without being committed.

It may be observed, that, under the old practice, it was held, that if a defendant, after his plea was overruled, put in three insufficient answers, the Court would not commit him to be examined upon interrogatories, as if he had put in four insufficient answers (p); and it is presumed, that, since the alteration in the practice before referred to, by which the consequences of a third insufficient answer are rendered the same as those which, under the old practice, resulted from a fourth, if a defendant should, after plea overruled, put in two answers which are insufficient, he will not be liable to the consequences of a third insufficient answer.

Interrogatories.

If a plaintiff, having obtained the order that the defendant should be examined upon interrogatories before the Master, &c., means to exhibit interrogatories, he must, if the defendant is in custody, do so immediately (q). The interrogatories are

(n) Ubi supra.

(o) Ibid.

(p) Clotworthy v. Mellish, 1 Cha. Ca. 279.

(q) Farquharson v. Balfour, 1 Turn. & Russ. 191.

For insufficiency.

Must be settled by the Master.

drawn by Counsel, but must be settled by the Master, care being taken that they go directly to the points as to which the exceptions are sustained, and it will be for the Master to judge whether they have a direct reference to those points or not (*r*).

Special order, referring it to the Master to settle them. *Query*, if now necessary?

In *Farquharson* v. *Balfour*, the interrogatories which had been prepared were handed up to the Court, and a special order was made referring it to the Master to settle them; it is presumed, however, that, in future, such an order would be considered unnecessary, and that the Master would, upon the authority of that decision, take upon himself the settlement of the interrogatories without an order for the purpose.

Order for defendant to attend the Master to be examined.

The Master having certified that he had settled the interrogatories, a motion was made, on the part of the plaintiff, that the defendant might be ordered to attend before the Master to answer the interrogatories personally, or, if he did not, that he should be committed to the Fleet; upon which occasion an order was made 'that the defendant should personally attend the Master, and be examined upon the interrogatories exhibited by the plaintiff, and that the Master should be at liberty to repeat the interrogatories, or any of them, as the Master might think fit.'

Defendant may be attended by Counsel.

On the hearing of the motion which led to the last-mentioned order, the question whether the defendant might be attended by Counsel upon his examination before the Master, was discussed, when Lord Eldon expressed his opinion to be, that the defendant might have the benefit of Counsel's advice, and that, notwithstanding the direction in *Gower* v. *Lady Baltinglass* (*s*), that the Counsel should be in the next room, the Counsel might be in the room during the examination.

Course of proceeding before the Master.

With reference to the mode of conducting the examination, his Lordship strongly recommended to the parties that the mode of examination should be this, viz.:—That the defendant should be allowed to put in a written examination to the interrogatories, and that then, he should attend the Master for the Master again to put to him each or any of the questions which he might think not sufficiently answered. His Lordship, how-

(*r*) Farquharson v. Balfour, 1 Turn. & Russ. 203.

(*s*) 1 Cha. Ca. 66; Turn & Russ. 193. (n.) S. C.

ever, said, that if the plaintiff would not consent to that mode of proceeding, he could not order it, but he intimated that the defendant might, upon going before the Master, have his examination in his hand, and refer to it as memorandum of what answer he was to give. The mode of examination adopted by the Master, and which was subsequently approved of by the Lord Chancellor, was as follows:—A written answer to the interrogatories was prepared and carried in by the defendant to the Master, who compared the answer with the interrogatories, and then determined whether or not it was satisfactory. In the points in which the Master considered the answer to be unsatisfactory, the defect was supplied by the personal examination of the defendant till the Master was of opinion that the answer was sufficient (*t*).

For insufficiency.

Plaintiff not entitled to attend.

The plaintiff is entitled to no notice of the defendant's being under examination, and has no right to attend before the Master.

Master's report.

The defendant having passed his examination to the satisfaction of the Master, the Master reports the same to the Court (*u*). The defendant, however, is not entitled to his discharge out of custody upon the Master's report of the sufficiency of his examination till the plaintiff has had an opportunity of perusing the examination (*x*). The plaintiff has also a right, before the defendant is discharged, to see all the documents mentioned in the schedules, or referred to in the examination, if they are so mentioned or referred to that, in the case of an answer, they would have made part of the answer (*y*).

Defendant not to be discharged till plaintiff has seen his examination, and all the documents referred to.

Sufficiency of examination, how to be discussed.

It seems to have been the opinion of Lord Eldon, that the proper mode of discussing the sufficiency of the defendant's examination in a case of this description is to consider it upon the old exceptions with respect to any of the original interrogatories in the Bill remaining unanswered, and upon new exceptions with reference to any new questions which the Master may have introduced in settling the interrogatories. In the above case of *Farquharson* v. *Balfour*, however, he ex-

(*t*) Farquharson v. Balfour, 1 Turn. & R. 200.
(*u*) Ibid. 201.
(*x*) Ibid. 202.
(*y*) Ibid.

For insufficiency.

Motion for discharge.

pressed a wish to hear Counsel on the point, but the question of insufficiency was ultimately discussed upon the motion for the discharge of the defendant, when the Lord Chancellor was of opinion, that the examination, taking it altogether, would be sufficient if the defendant would make an affidavit that he had not in his possession, and had no recollection of, the contents of a letter which he had set forth in some of the earlier proceedings in the cause with so much particularity as to induce a belief that he must have had it in his possession, but to which he had not adverted in his answer to the interrogatories.

Order for discharge.

The defendant afterwards made the affidavit required by the Lord Chancellor, whereupon an order was made that he should deposit with the Master, upon oath, the deeds, books, papers, and writings mentioned in the schedules to his answers and examinations; and thereupon, and upon his paying to the plaintiff the costs, *charges, and expenses* already taxed, and giving security, to be allowed of by the Master, for the payment of such further costs, *charges, and expenses* as the Court should award, it was ordered that he should be discharged out of custody as to his contempt, &c. (*z*).

Costs.

The rules with regard to the costs of scandal or impertinence have been before pointed out (*a*).

By the General Orders of the Court, as they existed before the year 1828, if the plaintiff procures a reference of an answer for insufficiency, and the answer is reported sufficient, the plaintiff is to pay the defendant 40*s*. costs (*b*), and the defendant may proceed for the recovery of these costs by *subpœna* and attachment, in like manner as the plaintiff, in case the report be in his favour (*c*).

We have seen before, that where a defendant submits to

(*z*) Farquharson v. Balfour, 1 Turn. & R. 200.

(*a*) Ante, v. 1.

(*b*) Beames's Ord. 182.

(*c*) For. Rom. 103.

answer the exceptions before any order of reference is made, he must pay to the plaintiff 20*s*. costs (*d*); and it seems, that if he submits after an order of reference has been made, but before the report, he must pay 30*s*. costs (*e*).

Costs.

Under the old practice of the Court, if the answer was reported insufficient, the defendant was (if it was a first answer,) to pay 40*s*. costs, when the answer was put in by the defendant in person, but if put in by commission, 50*s*. If it was a second answer, the defendant was to pay 60*s*. costs, and upon the third answer 80*s*. costs, and upon the fourth answer 5*l*. (*f*), with the costs of the contempt if the plaintiff availed himself of the right of commitment (*g*). This rule is still the rule of the Court; but, by the 19th of Lord Brougham's Orders, it has been directed, that the Master to whom any exceptions for insufficiency shall be referred, shall be at liberty, in making a report upon such exceptions, if he shall think fit, to certify by whom and in what proportions (if any) the costs of such exceptions and of the reference thereon ought to be borne. It is also ordered that regard shall be had to such certificate in taxing the costs, under the 28th Order of April, 1828, by which it is directed that when a plaintiff obtains a decree with costs, then the costs occasioned to the plaintiff by the insufficiency of the answer of any defendant, shall be deemed to be part of the plaintiff's costs in the cause, such sum or sums being deducted therefrom as were paid by the defendant, according to the course of the Court, upon exceptions to the answer being submitted to or allowed.

In what manner recovered.

The costs of insufficient answers are recovered by the usual process of *subpœna* and attachment; and it is to be observed that if a first or second answer is reported insufficient, the plaintiff will not, by accepting a further answer, waive his right to the costs already due to him for the insufficiency of the former answer (*h*).

(*d*) Ante, p. 310.
(*e*) 1 Smith's Cha. Pr. 290.
(*f*) Beames's Ord. 183.
(*g*) Ibid.; and Beames on Costs. 227.
(*h*) Brotherton v. Chance, Bunb. 34.

Exceptions to Master's Report.

The opinion of the Master in matters of scandal, impertinence, or insufficiency, is conclusive, unless by excepting to the Master's report or certificate, either of the parties bring the matter on for discussion in Court, and there obtain a different judgment (*i*).

Within what time.

There is little, if any, difference between the practice as to exceptions to a report upon a reference for scandal or impertinence, and one upon a reference for insufficiency; and the rules of practice by which the proceedings are governed, are in both cases nearly the same. In neither case should exceptions to the Master's report be filed till the report has been filed (*k*); but in the case of a reference for scandal or impertinence, when the Master has reported the answer to be scandalous or impertinent, the defendant, if he means to except to the report, should do so before the Master has proceeded to expunge the impertinent matter, as no exceptions can, as we have seen, be taken after the impertinent matter has ceased to appear on the record (*l*). In cases of insufficiency also, it is advisable for the party intending to except, to be expeditious, because the mere act of filing the exceptions and paying the deposit, will not preclude the adverse party from proceeding for his costs; in which case, the defendant may be so situated as not to be able to prepare exceptions and procure an order for setting them down with the Registrar, before service of the *subpœna* for costs, when, if he does not pay the costs, an attachment may be issued against him, and he will be in contempt, and thereby rendered incompetent to file his exceptions, till his contempt has been cleared (*m*).

In cases of scandal or impertinence.

In cases of insufficiency.

So as to avoid payment of costs of insufficient answer.

It is to be observed, that if the costs of an insufficient answer are paid upon service of a *subpœna* for costs, or upon the execution of an attachment for non-payment, they can never be recovered, although the exceptions to the Master's report should be allowed; if, therefore, a defendant finds himself to be in such a predicament that he cannot get his exceptions to the Master's report set down with the usual formali-

(*i*) Hind. 271.
(*k*) Ante.
(*l*) Ante, v. 1, 458; Craven v. Wright, 2 P. Wms. 181.
(*m*) Hind, 274.

Exceptions to Master's Report.

ties, before the *subpœna* for costs is issued, he should keep out of the way so as to avoid *personal* service of the *subpœna* till after the exceptions are set down, and then apply to the Court, by motion or petition, with a certificate annexed of the exceptions being filed, stating the case as it is, and that the exceptions are set down, and no delay made, and praying that the *subpœna* for costs, or the process which has issued for non-payment of them, may be stayed, and the Court will, in such case, interfere, and relieve the party (*n*).

When answer is insufficient.

At all events it is necessary, when the answer is reported insufficient, that the exceptions should be filed, and the deposit paid to the Registrar, and the order for setting them down procured and served before the time fixed by the Master's report, within which the defendant must put in his further answer has expired, for otherwise the defendant will be in contempt; and if a party be in contempt for not putting in a better answer, the mere act of filing and setting down exceptions to the report will not suspend the execution of any process which may have been issued (*o*).

Exceptions to report should be filed before further answer:—otherwise defendant will be precluded from taking the opinion of the Court.

The defendant should also, if the Master has reported his answer insufficient, except to the report before he puts in a further answer, for it has been held, that where a first answer is, upon exceptions, reported insufficient, the defendant, if he submits to put in a further answer without excepting to the report, admits that he ought to answer all the matter excepted to, and that he must, therefore, answer fully to all the points comprised in the exceptions, and cannot afterwards by excepting to the report made upon a reference of his second answer, raise the question whether he ought to be compelled to answer the exceptions or not: and upon this ground, where exceptions were taken which extended to matters not charged in the Bill, and, upon reference, the Master reported the answer insufficient, whereupon the defendants, instead of excepting to the Master's report, put in a futher answer which fully answered the charges in the Bill, but did not extend to those parts of the exceptions which were not founded on the Bill, and the Master, upon a second reference, reported the answer

(*n*) Hind. 271. (*o*) Ibid.

Exceptions to Master's Report.

to be still insufficient, the Court, upon exceptions to the Master's report, ruled that, inasmuch as the defendants did not except to the first report, but had since answered, they had admitted that they ought to answer all the matter of the exceptions (*p*). It seems, however, that where a defendant's object involves any general principle upon which he claims an exemption from answering, as that, the discovery sought might subject him to pains and penalties, &c., and his exceptions are overruled, he may, if he has by any accident, slipped his time, or otherwise precluded himself from excepting to the report, and upon exceptions to his second answer a like report is made, bring the question before the Court upon exceptions to the report upon the second answer (*q*). In a recent case, where exceptions were allowed by the Master, and the defendant, instead of an answer, put in a plea which was overruled upon argument, he was permitted, the case being very peculiar, to file exceptions to the Master's report, upon the exceptions *nunc pro tunc* (*r*).

Unless his objection be founded on some general principle.

Where answer is sufficient.

Where the Master has not reported the answer to be insufficient, the exceptions to the report ought to be filed before the time fixed by the rules of the Court for the plaintiff to file his replication has arrived (*s*), otherwise the defendant may move to dismiss the Bill for want of prosecution, in which case the plaintiff will not be able to shew exceptions to the Master's report as cause against dismissing the Bill. In injunction cases also, the plaintiff, if he wishes to revive an injunction, which has been dissolved upon the Master's report of the sufficiency of the answer, should lose no time in filing his exceptions to the report, otherwise he may lose the benefit he would derive from his injunction. When, also a plaintiff wishes to amend his Bill, he must, if he intends to except to the report, do so, and get his exceptions disposed of before he obtains the order to amend, as an order to amend will, as we have seen, be considered as a waiver of exceptions for insufficiency (*t*).

Form of exceptions.

Exceptions to a Master's report of insufficiency, or of scan-

(*p*) Crispe v. Nevil, 1 Cha. Ca. 60.

(*q*) Finch v. Finch, 2 Ves. 491.

(*r*) Noel v. Ward, 1 Mad. 339.

(*s*) Ord. 1831, XVI.

(*t*) Ante, p. 304.

dal, or impertinence, must be drawn or perused, and settled and signed, by Counsel.

Exceptions to Master's Report.

When the Master has reported an answer not scandalous or impertinent, the plaintiff, in his exceptions to the report, must shew in what line or page and how far the answer is scandalous or impertinent (*u*). And so, where an answer is reported sufficient, it is said that the plaintiff, in his exceptions to the report, should shew wherein it is insufficient (*x*); it seems, however, that the plaintiff may take one general exception to the whole report, and that the Court will, upon the hearing, allow or disallow such exceptions, either in the whole or in part (*y*).

How filed.

The exceptions being prepared and signed by Counsel, must be transcribed upon paper or parchment, and taken to the Registrar's Office and left with the Registrar; this is termed filing the exceptions; at the same time a deposit must be left with him, as a stake or recompense to the other party, if upon argument the exceptions should be disallowed (*z*). This deposit was formerly 5*l.* but, by Lord Lyndhurst's Orders (*a*), the deposit to be paid upon all exceptions to a Master's report, has been increased to 10*l.*

and set down.

A certificate of the deposit being left, must be procured from the Registrar and annexed to a petition, to be presented either to the Lord Chancellor or the Master of the Rolls, (as the case may be,) for an order to set down the exceptions to be argued. This petition and certificate must be taken to the Lord Chancellor or Master of the Rolls' Secretary, and when answered must be left at the Registrar's Office, to have the order for setting down the exceptions drawn up and passed: a copy of the order having been made and entered, the order itself must be served by delivering a copy thereof to the adverse Clerk in Court, either personally or to his agent, at his seat, in either case shewing, at the time of service, the original order passed and entered (*b*).

(*u*) Craven v. Wright, 2 P. Wms. 181; vide *contra* Mackworth v. Briggs, 2 Atk. 182.

(*x*) Craven v. Wright, ubi supra.

(*y*) Vide Cookson v. Ellison, 2 Bro. C. C. 252, ed. Belt, n. 4; Dawson v. Busk, 2 Mad. 184.

(*z*) Hind. 271.

(*a*) Ord. 1828, XLI.

(*b*) Hind. 272.

Exceptions to Master's Report.

The time for setting down the exceptions is generally within four days from the date of the order, the order itself requiring the party so to do, and to give notice forthwith, or the order to be of none effect (*c*).

It seems that an order for setting down exceptions duly made and served, although it will not, as we have seen, sustain an injunction, will operate to prevent the plaintiff from issuing or renewing process of contempt against the defendant, till the exceptions have been disposed of, unless the party was in contempt before the order was obtained and served. If the defendant was in contempt for not putting in a better answer at the time, the mere act of filing and setting down exceptions to the report will not suspend the execution of process of contempt delivered to the Sheriff, unless an order to stay the process has been obtained; such an order, however, will not be granted without notice to the adverse party, nor unless upon affidavit accounting for the delay, and the Court will exercise a discretion upon the propriety and regularity of the application (*d*).

Argument.

When the exceptions have been set down, the Solicitor for the party excepting must leave a fair copy of the report and exceptions, with the Lord Chancellor's or Master of the Rolls' Gentleman, three or four days before the day fixed for argument. An office copy, from the Report Office, of the report excepted to should also be procured, to be ready for production in Court if called for (*e*).

To prevent any inconvenience arising from the adverse party making default in appearing on the day for arguing the exceptions, it is proper to have ready an office copy of an affidavit of service upon his Clerk of the order for setting down the exceptions. The junior Counsel for the exceptions opens the exceptions to the Court, and the leading Counsel on the same side argues them; the Counsel against the exceptions then state their case to sustain the report, and the matter having been thoroughly discussed, the Judge, before whom they are argued, gives judgment for or against the report, by

Judgment.

by allowing or disallowing the exceptions (*f*).

(*c*) Ibid.
(*d*) Hind 274.
(*e*) Ibid. 275.
(*f*) Ibid. 276.

Exceptions to Master's Report.

Consequences of allowing.

The consequence of allowing all the exceptions, entitles the party excepting to take back his deposit (10*l.*). By a disallowance of the exceptions, the party succeeding takes the deposit, and the report is adjudged to be right (*g*).

Sometimes, a party, for delay, will set down exceptions, and will not appear at the hearing. The exceptions upon such default, are disallowed as of course, and the deposit ordered to the opposite party, if he appears; who, in such case, must make an affidavit of his being served with the order for setting down the exceptions, and produce an office copy of the affidavit, filed at the Affidavit Office, to the Registrar, before the order is delivered out to him with the deposit (*h*).

If neither side appear when the exceptions are called on, they will be struck out of the paper, and the party excepting may apply for his deposit (*i*).

So soon as the exceptions to the report are disposed of, the plaintiff may, if the result is a decision that the answer is insufficient, and the defendant's time for putting in a further answer has expired, proceed to enforce a further answer by issuing process of contempt, resuming it at the point where it had been discontinued. If the defendant is desirous of time to put in a further answer, he may, (if not in contempt,) apply to the Master for further time in the manner before pointed out; he must do so, however, before process of contempt has issued, otherwise he will not be in a situation to make the application (*k*).

Costs.

The Orders of April, 1828 (*l*), require, as we have seen, that the party excepting to a Master's report shall deposit 10*l.* (*m*), and, if on argument the exceptions are overruled, the deposit is, generally speaking, paid to the other party; if the exceptions are allowed the party making the deposit receives it back, on application for it. But, where some of the exceptions are allowed, and some overruled, the Court exercises its discretion with respect to the deposit, and sometimes divides it between the litigating parties (*n*). It will not, however, always make

(*g*) Hind. 276.
(*h*) Ibid. 277.
(*i*) Ibid.
(*k*) Ante, p. 319.
(*l*) Ord. XLI.
(*m*) Ante, p. 331.
(*n*) Beames on Costs, 228; vide Dawson v. Busk, 2 Mad. 184.

Exceptions to Master's Report.

such a division, and where a defendant took a general exception to a report finding his examination insufficient, and the Court held the report to be right in part and wrong in part, the Vice-Chancellor refused to make any order as to costs, but gave the plaintiff the deposit (o).

Formerly, the Court would sometimes, upon exceptions to a Master's Report being overruled, give the successful party costs beyond the amount of the deposit (p), but now, instead of the party being considered as only *eventually* entitled to such costs, the above order (q) has directed, that, upon the exceptions being overruled, the exceptant shall, besides the deposit, pay the further taxed costs occasioned by the exceptions, unless the Court shall otherwise order. In the case, however, of the exceptant, in part succeeding, the costs as well as the deposit are to be dealt with as the Court shall direct (r).

When the Court, upon exceptions, *overrules* the Master's report, the party succeeding shall not have the costs, but they must abide the event of the suit (s).

Sect. V.

Of Further Answers, and Answers to Amended Bills.

Further answer. Within what time.

If exceptions to a defendant's answer are allowed upon reference to a Master, the defendant must put in a further answer within the time allowed him for that purpose by the Master's report, or such further time as the Master may allow him upon special application for that purpose (a).

After exceptions allowed.

If the defendant submits to the exceptions before the order for reference is served, he must put in his answer, if in a town

(o) Ward v. Fitzhugh, 7 Sim. 42.

(p) Beames on Costs, 227.

(q) Ord. 1828, XLI.

(r) As to the costs of rehearings and exceptions, vide post, Rehearings and Appeals.

(s) Anon. 3 Atk. 235.

(a) Ante, p. 319.

cause, within four weeks from his submission; if in a country cause, within six weeks; unless he be in contempt, or has entered his appearance with the Registrar, in which case no time will be allowed him beyond the period of eight days, which he has by the practice of the Court, to consider whether he will submit to the exceptions or not (*b*).

Within what time. After exceptions submitted to before order of reference.

If the defendant submits to the exceptions after the order of reference has been made, the Master must, as we have seen, fix the time within which the further answer is to be put in (*c*).

— After order of reference.

If, after the Master has reported the defendant's answer insufficient, the plaintiff obtains and serves an order, 'that the defendant may answer the amendments and exceptions at the same time,' the defendant need not answer the exceptions till the time for answering the amended Bill has expired, in which case he must put in 'a further answer to the original Bill of complaint, and an answer to the amended Bill of complaint.' If he put in a further answer only, or an answer to the amended Bill only, the plaintiff may move to have it taken off the file, unless he is desirous that it should remain there, in which case he should move for leave to issue an attachment (*d*).

—After order to answer amendments and exceptions at the same time.

If the defendant, after exceptions allowed, can contrive to put in his further answer to the original Bill, before the plaintiff serves the order for him to answer the amendments and exceptions at the same time, he will deprive the plaintiff of the benefit of that order (*e*). The defendant will also, by such means prevent the plaintiff from obtaining an injunction where he has not got one already. In *Duckworth* v. *Boulcott* (*f*), where a further answer was filed on the same day that the Master's report was made; an order for an injunction obtained on the next day was discharged for irregularity, though if the filing of the answer had been delayed till the next day, the injunction would have been regular.

A further answer, as well as an answer to an amended Bill, is in every respect similar to and is considered as part of the

Need not embrace any point already answered in original Bill.

(*b*) Ante, p. 310.
(*c*) Ante, p. 316.
(*d*) De Tastet v. Lopez, 1 Sim. 11.
(*e*) Ante, v. 1, p. 529.
(*f*) 3 Swanst. 270.

Form of.

answer to the original Bill; therefore, if a defendant in a further answer, or an answer to an amended Bill, repeats any thing contained in a former answer, the repetition, unless it varies the defence in point of substance, or is otherwise necessary or expedient, will be considered as impertinent; and if upon reference to a Master such parts of the answer are reported to be impertinent, they will be struck out as such with costs, which are, in strictness, to be paid by the Counsel who signed the answer (g). It is to be observed, however, that if, after an answer has been put in, the plaintiff amends his Bill, stating an entire new case, the defendant must answer that case, even though in so doing he answers some of the interrogatories which were in the original Bill (h).

Unless an entire new case is made by amendments.

It has been before stated, that when a defendant has insisted, in his first answer, upon some general ground of exemption from answering to particular interrogatories, and the Master has reported against him, but the defendant has omitted to except to the report, he may still insist upon the same ground of defence by his further answer (i), though it seems that he cannot do so when his reason for not answering has been founded on an objection to the interrogatories themselves (k).

Form of.

The form of a further answer and of an answer to an amended Bill is nearly the same as that of an answer to an original Bill. If it be an answer to amendments as well as to exceptions, it must be entitled, 'the further answer of A. to the original Bill of complaint, and the answer of the same defendant to the amended Bill of complaint of,' &c. (l). If, after exceptions to the original Bill are allowed, the plaintiff amends his Bill, and the defendant puts in a further answer to the original Bill and an answer to the amended Bill, and the answer is referred back upon the old exceptions as to the original Bill and upon new exceptions as to the amendments, and is again reported insufficient, whereupon the Bill is again amended, the answer should be, 'a further answer to the

(g) Lord Red. 256-7.

(h) Mazarredo v. Maitland, 3 Mad. 66.

(i) Ante, 330.

(k) Ante, 329.

(l) Peacock v. the Duke of Bedford, 1 V. & B. 186.

original and first amended Bill, and an answer to the secondly amended Bill, &c.'

Form of.

It is to be observed, however, that it is not necessary, in answering a Bill which has been amended before answer, to call it an answer to the original and amended Bill; the most correct way is to call it 'an answer to the *amended* Bill' only, as the original Bill has become nugatory by the amendment, and the defendant is not bound to notice it either in an answer or a demurrer (*m*).

How filed.

Further answers and answers to amended Bills must be prepared, signed, and filed in the same manner as answers to original Bills (*n*). It has been before stated, that, after an answer has been reported insufficient upon exceptions, a commission to take a further answer in the country cannot, strictly speaking, be sued out without an order, unless the Clerk in Court for the plaintiff gives his consent, which, however, is, in practice, never withheld (*o*).

Commission.

Sect. VI.

Of Amending Answers; and of Supplemental Answers.

In what cases amendments allowed.

After an answer has been put in upon oath, the Court will not, for obvious reasons, readily suffer any alteration to be made in it. There are, however, many instances in the books in which it appears that the Court, upon special application, has allowed the defendant to reform his answer. Thus where, in an answer to a tithe Bill, the defendant had sworn that a certain close contained nine acres, he was permitted to amend it by stating the close to contain seventeen acres, even though issue had been joined and a commission issued (*a*). So where, owing to the mistake of the engrossing clerk, the words '*her* shares' had

In cases of mistake or error;

(*m*) Smith v. Bryon, 3 Mad. 428.
(*n*) Ante, p. 272.
(*o*) Ante, p. 37.

(*a*) Berney v. Chambers, Bunb. 248, sed vide Moutague v. ——, cited ib. n. and Gwil. 674, n.

In what cases.

been introduced into an answer instead of '*ten* shares,' the answer was allowed to be taken off the file and amended (*b*). And where there has been a mistake in the title of the answer, an amendment of it has been permitted (*c*).

— of new matter discovered,

— or of surprise,

— or of misrepresentation;

The Court has also allowed a defendant to amend his answer where new matter has come to his knowledge since it was put in (*d*), or in cases of surprise, as where an addition has been made to the draft of the answer after the defendant has perused it (*e*). In like manner, where a plaintiff, having drawn the defendant into an agreement, whereby, for a small consideration, he was to relinquish to the plaintiff all his right and interest in a certain estate which had been left to him, filed a Bill to have the agreement performed, to which the defendant put in an answer confessing the agreement, and submitting to have it performed, but, afterwards discovering that the estate was of several thousand pounds value, he applied for leave to take his answer off the file, and to put in another, which was granted (*f*).

— by limiting admission of assets.

The Court has also permitted a defendant to amend an answer by limiting the admission of assets it contained where it was clearly established that such admission had been made by mistake, and through the carelessness of the Solicitor's clerk (*g*).

Not where facts are correctly stated, but law mistaken.

The Court, however, has never permitted amendments of this nature, where the application has been made merely on the ground that the defendant, at the time he put in his answer, was acting under a mistake in point of law; and not on the ground of a fact having been incorrectly stated. Thus where a defendant, who was an executor, had admitted himself accountable for the surplus, and it was afterwards found that the circumstances of the case were such that he would have been entitled to it himself, permission to

(*b*) Countess of Gainsborough v. Gifford, 2 P. Wms. 424.

(*c*) Griffiths v. Wood, Amb. 62; White v. Godbold, 1 Mad. 269; Peacock v. Duke of Bedford, 1 V. & B. 186.

(*d*) Patterson v. Slaughte., Amb. 292; Wells v. Wood, 10 Ves. 401.

(*e*) Chute v. Lady Dacre, 1 Eq. Ca. Ab. 29.

(*f*) Alpha v. Payman, 1 Dick. 33.

(*g*) Dagley v. Crump, 1 Dick. 35.

amend was refused (*h*). So where a defendant had, by his answer, admitted the receipt of a sum of money from his father by way of advancement, and refused to bring it into Hotchpot, he was not permitted to amend his answer as to the admission, although he swore that he made it under a mistake as to the law of the case (*i*).

In what cases.

The Court will also refuse to permit an amendment of an answer after an indictment for perjury preferred or threatened, even though it consider it to be clear that the defendant did not intend to perjure himself, and had no interest in so doing (*j*).

Nor where a prosecution is pending.

From the above cases, it appears, that it was formerly the general practice of the Court, if it saw a sufficient ground for so doing, to permit the defendant to amend his answer. Lord Thurlow, however, as it seems, introduced a better course in cases of mistake; not taking the answer off the file, but permitting a sort of supplemental answer to be filed, and by that course leaving to the parties the effect of what has been sworn before, with the explanation given by the supplemental answer (*k*). This practice has been since adopted in all cases in which it is wished to correct a mistake in an answer as to a matter of fact (*l*); and it is not confined to cases of mistake only, but has been extended to other analogous cases; as where a defendant, at the time of putting in his original answer, was ignorant of a particular circumstance, he has been permitted to introduce that circumstance by supplemental answer (*m*). And where a defendant had wished to state a fact in his original answer, but had been induced to leave it out by the mistaken advice of his Solicitor, he was allowed to state it by supplemental answer (*n*). So where the defendant had been induced, by the misrepresentation of the plaintiff, that certain securities mentioned in the Bill had been fairly obtained, to put in an answer admitting

Modern practice to permit a supplemental answer to be filed, — in all cases of mistake,

— or of ignorance,

— or of misrepresentation.

(*h*) Rawlins v. Powel, 1 P. Wms. 300.

(*i*) Pearce v. Grove, Amb. 63; 3 Atk. 522. S. C.

(*j*) Verney v. Macnamara, 1 Bro. C. C. 419.

(*k*) Per Lord Eldon, in Dolder v. Bank of England, 10 Ves. 284. Vide Jennings v. Merton Coll., 8 Ves. 79; Wells v. Wood, 10 Ves. 401.

(*l*) Strange v. Collins, 2 V. & B. 163; Taylor v. Obee, 3 Pri. 83; Ridley v. Obee, Wightw. 32.

(*m*) Jackson v. Parish, 1 Sim. 505; Tidswell v. Bowyer, 7 Sim. 64; vide Const v. Barr, 2 Mer. 57.

(*n*) Nail v. Punter, 4 Sim. 474.

Supplemental answers.

the securities, &c., the defendant was permitted, upon application, to file a supplemental answer (*nn*). In *Bousfield* v. *Paterson* (*o*), a defendant was allowed to file a supplemental answer for the purpose of stating, that since his original answer had been filed, probate had been granted of a will mentioned in the pleadings.

Court very cautious in allowing supplemental answer.

But although the Court will, in cases of mistake, or other cases of that description, permit a defendant to correct his answer by a supplemental answer, it always does so with great difficulty, where an addition is to be put upon the record prejudicial to the plaintiff, though it will be inclined to yield to the application, if the object is to remove out of the plaintiff's way the effect of a denial, or to give him the benefit of a material admission (*oo*). And therefore where a defendant had, by his original answer to a Bill for the specific performance of a contract, admitted that he took possession of the whole property in pursuance of the contract, but afterwards applied for leave to put in a supplemental answer to limit the admission to part of the premises only, upon affidavits of mistake, &c.; Lord Eldon refused to grant the motion unless the defendant would tell him, upon his oath, that, when he swore to his original answer, he meant to swear in the sense in which he, by his application, desired to be permitted to swear to it (*p*).

What the Court requires to be verified by affidavit.

The Court also requires, that, in making the application, the defendant should state specifically what he wishes to put upon record, in order that it may judge how far his application is reasonable (*q*). And it is to be observed, that the Court will not allow a supplemental answer to be filed, unless on new matter, nor unless a sufficient reason appears for not having inserted it in the original answer (*r*). Where, however, a defen-

(*nn*) Curling v. Marquis of Townshend, 19 Ves. 628.

(*o*) Cited 1 Smith's Ch. Pr. 271.

(*oo*) Edwards v. M'Leay, 2 V. & B. 256; Lord Eldon in this case, as well as in Strange v. Collins, ib. 166, appears to have been of opinion, that a supplemental answer ought not to have any effect upon an indictment for perjury upon the original answer. Sed vide King v. Carr, 1 Sid. 418, 2 Keb. 516.

(*p*) Livesey v. Wilson, 1 V. & B. 149; vide etiam Greenwood v. Atkinson, 4 Sim. 54.

(*q*) Curling v. Marquis of Townshend, 19 Ves. 628, 631.

(*r*) Tennant v. Wilsmore, 2 Anst. 362.

dant had, by his answer, set up certain moduses, but had not stated at what time they were payable, the Lord Chief Baron Alexander allowed him to file a supplemental answer for the purpose of supplying the omission, without any affidavit in explanation, it being evident that the omission must have arisen from a mere slip, as the moduses, as laid, would have been void (*s*).

Supplemental answers.

It is also to be observed, that, in making an application for leave to file a supplemental answer, the defendant must make such a case that it shall appear to be due to general justice to permit the case already on record to be altered; and even where a defendant applied for leave to file a supplemental answer for the purpose of making an admission in favour of the plaintiff, upon an affidavit that, from certain circumstances which had since occurred, he was satisfied he ought to have admitted a fact which he had denied; Lord Eldon held, that the affidavit ought to have stated, that, at the time of putting in the answer, the defendant did not know the circumstances upon which he made the application, or any other circumstances upon which he ought to have stated the fact otherwise (*t*).

Supplemental answer must be confined to the object applied for.

Where a defendant has obtained permission to file a supplemental answer for the purpose of correcting a mistake in his original answer, he must confine his supplemental answer strictly to the correction of the mistake sworn to. If he goes beyond that, and makes any other alteration in the case than what arises from the correction of such mistake, his supplemental answer will be taken off the file (*u*).

In a recent case (*x*), the Vice-Chancellor, Sir L. Shadwell, stated, that he had some recollection of a case where a modus had been stated, and the parties, having afterwards found that they had made some mistake, applied to Lord Eldon for leave to file a supplemental answer for the purpose of correcting the mistake, and that his Lordship (instead of making the order prayed) ordered that the cause should proceed as if the modus had been laid in the way in which it was proposed; and upon the authority of that case his Honour made a similar order.

(*s*) Scott v. Carter, 1 Y. & J. 452.

(*t*) Wells v. Wood, 10 Ves. 401.

(*u*) Strange v. Collins, 2 V. & B. 163, 167.

(*x*) Podmore v. Skipwith, 2 Sim. 565.

Supplemental answers.

Defendant cannot controvert facts in his answer by cross bill.

It is to be observed, that where a defendant has, at the time of putting in his original answer, mistaken facts, he cannot contravene his own admission in any other way than by moving to correct his answer either by amendment or supplemental answer. He cannot do so by filing a cross Bill(*y*).

Within what time application must be made.

There appears to be no particular limit to the time within which an application for leave to file a supplemental answer to correct a mistake in an original answer will be complied with, provided the cause is in such a state, that the plaintiff may be placed in the same situation that he would have been in, had the answer been correct at first. Accordingly we find several instances in the books in which such applications have been granted after replication filed(*z*). Where, however, the plaintiff cannot be placed in the same situation that he would have been in had the defence been stated on the record in due time, the Court will not permit a supplemental answer to be filed. Therefore, where an application for leave to file such an answer was made after the cause had been set down for hearing, the Court refused the motion with costs(*a*).

In what cases the Court will still permit an answer to be amended.

But although the rule of practice now is, that, in cases of mistake in the statement or admissions in an answer, or in analogous cases, the defendant will not be permitted to amend his answer, but must apply for leave to file a supplemental answer for the purpose of correcting the mistake; the old course of taking the answer off the file and amending it, is still pursued in cases of error or mistake in matters of form. Thus in *White* v. *Godbold*(*b*), where the title of an answer was defective, a motion by the defendant to take it off the file and amend and reswear it, was granted; and so where, in the title of an answer, the name of the plaintiff was mistaken, a similar order was made(*c*). The addition of the name of a party omitted in the title, has also been permitted(*d*).

(*y*) Berkley v. Ryder, 2 Ves. 533.

(*z*) Curling v. Marquis of Townshend, ubi supra; Jackson v. Parish, 1 Sim. 505.

(*a*) Macdougal v. Purrier, 4 Russ. 486.

(*b*) 1 Mad. 269.

(*c*) Peacock v. Duke of Bedford, 1 V. & B. 186; Woodger v. Crumpton, 1 Fowl. Ex. Pr. 389; Lloyd v. Mytton, ib.; Keen v. Stanley, ib.

(*d*) Wright v. Campbell, ib.

So also the defendant has been permitted to add the schedules referred to in his answer, where they have been accidentally omitted (*e*); and in several cases in the Court of Exchequer, where verbal inaccuracies have crept into answers, they have been ordered, at the hearing, to be struck out (*f*). In like manner, where, in filing an answer, one skin had, by accident, been omitted, leave was given to the defendant to take it off the file for the purpose of rectifying the omission, upon condition, however, of his reswearing it immediately (*g*); and in general the Court will not permit such amendments as those above-mentioned, without making it part of the order that the answer shall be *resworn*, or, in case of a peer, again attested upon honour (*h*).

Amendment.

The Court has also permitted an answer to be amended by adding the name of the Counsel who signed the same to the record (*i*).

SECT. VII.

Of Taking Answers off the File.

For irregularity, on the application of plaintiff.

If any irregularity has occurred either in the frame or form of an answer, or in the taking or filing of it, the plaintiff may take advantage of such irregularity by moving to take the answer off the file. Instances in which such motions may be made have been before pointed out (*a*). All, therefore, that need now be suggested on this part of the subject is, that if the plaintiff intends to apply to the Court to take an answer off the file for irregularity, he should do so before he accepts the answer, otherwise he will have waived his right to make the

(*e*) Bryan v. Truman, ib.

(*f*) Ellis v. Saul, 1 Anst. 332. Vide Jesus College v. Gibbs, 1 Younge & Coll. 162.

(*g*) Lord Moncaster v. Braithwaite, 1 Younge, 382; Browning v. Sloman, 6 Law J. N. S. 48. Ex.

(*h*) Peacock v. Duke of Bedford, ubi supra.

(*i*) Harrison v. Delmont, 1 Pri. 108; Whitehead v. Cunliffe, 2 Younge & Coll. 3.

(*a*) Ante, pp. 266. 267, 268.

For irregularity. application; unless in the case of an irregularity in the *jurat*, or of an omision of the oath or attestation of honour of the defendant, without an order to warrant such omission, in which cases, as we have seen, there can be no waiver of the irregularity (*c*).

—on the part of the defendant, The Court has sometimes also, as has been stated in the last section, allowed an answer to be taken off the file on application on the part of a defendant, for the purpose of enabling him to correct a mistake in its form; but it does so only, as we have seen, upon the condition that the defendant shall, immediately upon the correction being made, reswear it; and it will never make such an order where the plaintiff can be at all prejudiced by it.

Because it is evasive. With respect to the question whether, if an answer is evidently evasive upon the face of it, as where it merely states an immaterial fact, and denies combination, &c. the Court will entertain a motion to take it off the file, or leave the plaintiff to his remedy by exceptions, it does not appear to be very clearly settled.

Rule where accompanied by demurrer. It has been before stated, that where a defendant does not put in a demurrer within the twelve days limited for that purpose by the rules of the Court, the mere denial of the combination usually charged in the Bill will not be a sufficient compliance with the 10th Order of the 21st of December, 1833. which precludes a defendant, after that time, from demurring alone; and that the Court will, in such cases, order the demurrer and answer to be taken off the file as evasive (*d*). It has also been stated, on the authority of *Tomkin* v. *Lethbridge* (*e*), that if the denial of combination be accompanied by an answer to one fact only, it will be a sufficient compliance with the terms of the order;

Where unaccompanied by demurrer. but it does not very distinctly appear, whether, in the case of a mere answer unaccompanied by a demurrer, such an answer will be considered as so far evasive as to cause the Court to remove it from its records. *Tomkin* v. *Lethbridge* was a case where the answer was of this description; but Lord Eldon, it is to be observed, made no order upon it,

(*c*) Ante, p. 280.
(*d*) Ibid. p. 80.
(*e*) 9. Ves. 179. vide etiam Baker v. Mellish, 11 Ves. 73.

As evasive.

and although he intimated his intention, if such a thing should happen again, to make a general order to prevent it in future, to the effect that whenever it can be shewn that an answer is a mere delusion, it should be understood to be the practice to take it off the file, yet no such general order was ever made; and in *Marsh* v. *Hunter* (*f*), Sir John Leach, V. C., held, that as no such order was made, the Lord Chancellor's opinion admitted that an application to take an answer off the file, upon the ground above stated, was not warranted by the existing practice.

It is to be remarked, that, in a note to the last case, the learned reporter appears to intimate, that in *Smith* v. *Serle* (*g*), Lord Eldon had acted upon a contrary view of the practice from that which he took in *Tomkin* v. *Lethbridge;* it will be seen, however, upon reference to the two cases, that they were totally distinct. In *Tomkin* v. *Lethbridge*, the defendant had answered one fact, besides the denial of combination; but in *Smith* v. *Serle*, it did not appear that he had gone even to that extent; the ground of the application in fact was, that the defendant had not answered any part of the amended Bill, but had put in, by way of answer to the amended Bill, a mere transcript of his answer to the original Bill. The same observation is applicable to *Glassington* v. *Thwaites* (*h*), which has been before referred to, for there, in fact, although the document in question was entitled 'an answer and disclaimer,' it did not contain any answer at all to any part of the Bill; so that, in fact, it was liable to be removed from the file, for irregularity, because it was not intitled a 'disclaimer' only.

Upon the whole, the practice of the Court, as laid down in the foregoing cases, appears to be, that although the Court will remove from the file any document which purports to be an answer, but which is not so in reality, yet, if any part of such document does entitle it to fill the character which it assumes, although it is an answer only to one fact, the Court will not take upon itself to decide whether it is evasive or not, but will leave the plaintiff to except to it for insufficiency.

(*f*) 3 Mad. 497.
(*g*) 14 Ves. 415.
(*h*) 2 Russ. 458; ante, p. 234

As evasive.

It is to be observed also, that even in those cases in which the Court would take the document off the file, it will not entertain an application for that purpose after the plaintiff has delivered exceptions to it, for insufficiency (*i*).

Sect. VIII.

From what Time to be deemed sufficient.

First answer.

We have before seen, that, by the fourth order of April, 1828, a plaintiff, after an answer to an original Bill has been filed, (whether it be filed in term time or vacation,) is allowed two months to deliver his exceptions, to which is added, by the same order, that, if the exceptions be not delivered within the two months, the answer shall from thenceforth be deemed sufficient (*a*).

Where no exceptions are delivered.

When exceptions are delivered, but not referred.

Where exceptions are delivered, the plaintiff has, after the expiration of eight days from the delivery of them, six days more to procure an order to refer them; and if he does not procure and *serve* such order within that time, the answer is thenceforth to be deemed sufficient (*b*).

If the defendant submits to answer without a report from the Master, the answer is to be deemed *insufficient* from the date of such submission (*c*).

When exceptions are referred, but no report.

So where an order of reference has been procured, unless the plaintiff shall procure the Master's report within a fortnight from the date of such order, or such further time as the Master shall, within the fortnight, certify to be necessary, in order to enable him to make a satisfactory report, the answer shall be deemed sufficient from the time when such a report ought to have been made (*d*).

(*i*) Glassington v. Thwaites, ubi. supra.
(*a*) Ante, p. 308.
(*b*) Ibid. p. 312; Ord. 1828, V.
(*c*) Ante, 313.
(*d*) Ibid. p. 316; Ord. 1828, XII.

Further answer.

When answer reported sufficient.

If, upon a reference for insufficiency, the answer shall be certified to be sufficient, it shall be deemed so from the date of the Master's report (*e*).

Further answer.

If the defendant submits to exceptions, or upon a reference the answer is reported insufficient, and the defendant puts in a second or third answer, the answer will be deemed sufficient at the end of *three weeks* from the filing of it, unless the plaintiff in the mean time refers it for insufficiency upon the old exceptions (*f*).

Where Master's report overruled on exceptions.

If, upon a reference of exceptions, the Master reports an answer insufficient, and the defendant excepts to the report, and his exceptions are allowed, the answer is to be deemed sufficient from the date of the Master's report (*g*).

Computation of time; Michaelmas and Trinity vacations excluded.

It is to be observed, that, by the 19th Order (*h*), the time which occurs between the last seal after Trinity Term and the first seal before Michaelmas Term, and the last seal after Michaelmas Term and the first seal before Hilary Term, shall not be reckoned in the computation of time which is allowed to a party for amending a Bill for filing, delivering, or referring exceptions to any answer, or for obtaining the Master's report upon such exceptions; therefore, in computing the time within which an answer is to be deemed sufficient, those periods are not to be reckoned. Upon this ground, where an application was made to dismiss a Bill for want of prosecution, at the expiration of four lunar months from the filing of the answer, the Vice-Chancellor held the application to be premature, because the interval between the last seal after Michaelmas Term and the first seal before Hilary Term had not been excluded from the computation (*i*). It is to be remarked, however, that it is only in computing the time within which the answer is to be deemed sufficient, that these periods are to be excluded; if they occur in the interval which elapses after the time when the answer is to be deemed sufficient, and the motion to dismiss, they are to be included in the reckoning (*k*).

Secus in motions to dismiss.

(*e*) Ord. 1828, IX.
(*f*) Ord. 1831, VI.
(*g*) 1 Smith's Ch. Pr. 287.
(*h*) Ord. 1831.
(*i*) Attorney-General v. Jones, 5 Sim. 246.
(*k*) Marriott v. Tarpley, 3 Sim. 18.

Computation of time.

When no seal day, first day of term to be considered as seal day.

It is also to be observed, that, if there be no seal before either of the terms above mentioned, the first day of term is to be considered as the 'first seal,' and the computation made accordingly even though the Court may have sat upon other business before the term(*l*).

Commencement of calculation.

It seems, likewise, that in all calculations of time under the New Orders, the period of calculation is to commence on the day after the day in which, by the terms of the order, the act from which the calculation is to be computed is performed, and that it is not to expire till the end of the last day of the computed time, and that if such last day should happen to be Sunday, the whole of the next day is to be included(*m*).

— If last day Sunday.

(*l*) Angell v. Wescombe, 1 M. & C. 48.

(*m*) Ibid.

CHAP. XVI.

OF THE JOINDER OF SEVERAL DEFENCES.

What defences may be joined.

It has been before stated that all or any of the several modes of defence before enumerated may be joined in a defence to one Bill (*a*); thus a defendant may demur to one part of the Bill, plead to another, answer to another, and disclaim as to another (*b*). A defendant may also, as we have seen, put in separate and distinct demurrers to separate and distinct parts of the same Bill (*c*). He may also plead different matters to separate parts of the same Bill (*d*). When this species of defence is adopted, the same rules which have been before laid down with reference to each mode of defence, when adopted singly, must be observed when the same modes of defence are resorted to collectively. Lord Redesdale lays it down, that 'all these defences must clearly refer to separate and distinct parts of the Bill; for a defendant cannot plead to that part to which he has already demurred, neither can he answer to any part to which he has either demurred or pleaded, the demurrer demanding the judgment of the Court whether he shall make any answer, and the plea whether he shall make any other answer than what is contained in the plea. Nor can the defendant, by answer, claim what, by disclaimer, he has declared he has no right to. A plea or answer will therefore overrule a demurrer, and an answer a plea; and if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer' (*e*).

Each must refer to separate parts of the Bill,

as well in substance as in words.

In addition to what has been so clearly laid down by Lord Redesdale, it is to be remarked that where a defendant adopts this mode of defence, it is necessary, according to the rules of

(*a*) Ante, p. 3.
(*b*) Lord Red. 258.
(*c*) Ante, p. 68.
(*d*) Ante, p. 106.
(*e*) Lord Red. 258.

What defences may be joined.

the Court, not only that each defence should in words be applicable to the distinct part of the Bill to which it professes to apply, but that it should be so in substance; and that if a defence, though in words applicable to part of a Bill only, should on the face of it be applicable to the whole Bill, it will not be good, and cannot stand in conjunction with another distinct defence which is applicable and applied to another distinct part of the Bill (*f*): and, therefore, where a defendant, as to part of a Bill, put in a plea that there was no outstanding term, and a demurrer as to the rest on the ground that the plaintiff had no title, the Master of the Rolls (Lord Langdale,) although he held the plea to be good, was of opinion that the demurrer, being applicable to the whole Bill, and consequently to that part of it which was covered by the plea, was bad (*g*).

Form of defence.

Great caution, it is obvious, must be necessary in framing a defence of this nature, to separate the part of the Bill to be affected by each, from the parts to be covered by the others, in a clear and distinct manner, so as to leave no possibility of doubt in the mind of the Court as to the portion of the Bill to which each defence is applicable. The rules for effecting this object have before been so fully pointed out, in treating of partial demurrers (*h*) and pleas (*i*), that it will be unnecessary to repeat them in this place.

Title.

It is to be observed that when a demurrer is to part only of the Bill, and is accompanied by an answer or other defence to the remainder, it should be entitled '*The demurrer of A. B., &c. to part of the Bill of complaint of C. D., and the answer, &c., of the said A. B. to the remainder of the said Bill of complaint*' (*k*). The same rule is applicable to cases where the defence is partly by plea and partly by answer, except in those cases where the answer is in support of the plea; in such cases, the plea and answer form but one defence, and the title is properly a '*Plea and Answer* (*l*).'

(*f*) Crouch v. Hickin, 1 Keen, 385.

(*g*) Ibid. His lordship, however, allowed a demurrer *ore tenus* for want of equity to that part of the Bill which was not covered by the plea; ante, p. 74.

(*h*) Ante, p. 75.

(*i*) Ibid. 206.

(*k*) Tomlinson v. Swinnerton, 1 Keen, 9, 13.

(*l*) Ante, p. 205.

What defences may be joined.

In what manner put in.

A demurrer, coupled with a plea and answer, or either of these defences, may be put in after the twelve days allowed for demurring alone have expired (*m*). It may also be taken under a commission to take a plea, answer, and demurrer, but not under a commission to take an answer only (*n*).

Of setting down demurrer and plea.

Where a defence of this nature has been put in, the first thing is to dispose of the demurrer, and also of the plea, if there is one, (unless it is intended to admit that it is a valid defence, if true,) and for this purpose the demurrer and plea must be entered and set down for argument in the usual way (*o*). If, however, there should be any impertinence in the plea or answer, care should be taken to have it expunged before it is set down, as the setting down a plea for argument is, as we have seen, a waiver of the impertinence (*p*); but the plaintiff must be careful not to amend his Bill, or except to the answer for insufficiency, before the demurrer and plea have been disposed of, otherwise they will be overruled (*q*).

Exceptions to answer.

If, upon the argument, the demurrer and plea are, or either of them are, overruled, the plaintiff may deliver exceptions for insufficiency, extending not only to the answer but to the parts of the Bill which were intended to be covered by the demurrer and plea; but if the demurrer and plea, or either of them, are allowed, the exceptions must not extend to the parts of the Bill covered by them (*r*).

Amendment of Bill.

The proper course to be pursued, where a partial demurrer has been allowed to a Bill, appears to be, to amend the Bill, either by striking out the part demurred to, or by making such alteration in the Bill as will obviate the ground of demurrer. Thus, after a partial demurrer has been allowed, *ore tenus*, for want of parties, the Bill may be amended by adding the necessary parties, or stating them to be out of the jurisdiction of the Court; and it seems that such an amendment will not preclude the plaintiff from excepting to the answer as to those parts of the Bill which are not covered by the demurrer (*s*).

(*m*) Ante, p. 89.

(*n*) Tomlinson v. Swinnerton, ubi supra.

(*o*) Ante, pp. 82, 218.

(*p*) Ibid, p. 219.

(*q*) Ibid. p. 219.

(*r*) Ante, p. 302.

(*s*) Taylor v. Bailey, 6 Law J. N. S. 222; Foster v. Fisher, 4 Law J. N. S. 237.

What defences may be joined.

Replication.

It is to be recollected, that, after a plea has been allowed, no amendment of the Bill can be made without leave of the Court; and that, in applying for such leave, the plaintiff must specify the amendments he intends to make (*u*). After the allowance of the plea, the plaintiff must reply to the plea as well as to the answer, and proceed with the case in the usual manner.

(*u*) Ante, v. 1, p. 525.

CHAP. XVII.

OF MOTIONS TO DISMISS.

Sect. I.—*On the Part of Plaintiff.*

On the part of the plaintiff.

According to the present practice of the Court, a plaintiff has two lunar months from the time, when (according to the rules laid down in the last section of the 15th chapter (*a*),) an answer is to be deemed sufficient, to consider what his future course of proceeding in the cause shall be (*b*).

During that time, he may either amend his Bill, or file a replication; or he may set the cause down for hearing upon Bill and answer; or else he may, if, upon due consideration, he conceives that he shall not be able effectually to prosecute the cause, apply to the Court, by motion, to dismiss his own Bill, either as against all the defendants, or against such of them as he thinks he can dispense with, with costs. This he may do as a matter of course (*c*).

Must be with costs to be taxed, &c.

It seems, about two hundred years since, to have been the privilege of the plaintiff to dismiss his Bill, when the defendant had answered, upon payment of 20*s*. costs; but that rule appears to have been altered even before the Statute of Anne (*d*). By that Statute (*e*), it is enacted, that, *upon the plaintiff's dismissing his own Bill, or the defendant's dismissing the same for want of prosecution, the plaintiff in such suit shall pay to the defendant or defendants his or their full costs, to be taxed by the*

(*a*) Ante, p. 346.
(*b*) Ord. 1831. XVI.
(*c*) Dixon v. Parks, 1 Ves. J. 402.
(*d*) Anon. 1 Vern. 116-334; Newsham v. Gray, 2 Atk. 288; Prac. Reg. 148; Beames on Costs, 228.
(*e*) 4 Ann. c. 16, s. 23.

With costs.

Master. The Court, therefore, will, in no case, after appearance, make an order to dismiss a Bill, on the plaintiff's application, without costs, unless upon the defendant's consent actually given in Court (*f*), even though the ground of the application be, that, upon the hearing of the cause, the Court would have ordered it to be so dismissed, and the defendant, although served with notice, does not appear to oppose the motion (*g*). And so strictly does the Court adhere to this rule, that, in *Fidelle* v. *Evans* (*h*), where a written agreement had been entered into between the plaintiff and the defendants to settle the suit, part of which agreement was, that the plaintiff's Bill should be dismissed without costs; the Lords Commissioners refused to make a positive order for such dismissal without the express consent of the defendants given in Court, and would not be satisfied with an affidavit of their having been served with notice of the motion: they gave the plaintiff, however, an order to dismiss without costs, *unless cause* should be shewn (*i*). But, notwithstanding the Statute above referred to, a plaintiff, where he has been admitted to sue in *formâ pauperis*, may move to dismiss his Bill without costs, except in cases in which his admission in *formâ pauperis* has taken place subsequently to the filing of the Bill (*k*). And where a defendant, by his own act, has rendered it impossible for the plaintiff to attain the object of his suit; *e. g.*, by surrendering a lease, to obtain an assignment of which is the object of the suit, and absconds; the Court will permit the Bill to be dismissed without costs (*l*). This, however, is an exception to the general rule above laid down.

Unless upon actual consent, given in Court

—even where done pursuant to agreement.

Secus where plaintiff sues in *formâ pauperis*;

—or where defendant, by his own act, has rendered the suit useless.

The course of proceeding to obtain the dismissal of the suit by a plaintiff who disavows the suit, has been before pointed out (*m*). It seems, however, that, even when the suit is not disavowed, one co-plaintiff may dismiss a Bill with costs, as

May be by one of several co-plaintiffs.

(*f*) Dixon v. Parks, ubi supra.

(*g*) Anon. 1 Ves. J. 140.

(*h*) 1 Cox. 27; 1 Bro. C. C. 267, S. C.

(*i*) In a recent case, the Vice-Chancellor refused to dismiss a Bill without costs, on a motion made by the defendant pursuant to an agreement, unless upon the consent of the plaintiff's Counsel given in Court. *Ex relatione* of E. D. Colville, Registrar.

(*k*) Ante, vol. 1, p. 46.

(*l*) Knox v. Brown, 2 Bro. C. C. 186; 1 Cox. 359, S. C.

(*m*) Ante, vol. 1, p. 404.

far as concerns himself; and it is said that he may do so on motion of course (*n*). But this does not appear to be in conformity with the modern practice; for, in *Holkirk* v. *Holkirk* (*o*), it is stated, that Counsel appeared, and that the Court refused to make an order for such dismissal, unless upon terms framed so as to protect the other plaintiffs in the suit from injury.

By one of several plaintiffs.

With respect to what will be considered such an injury to the other plaintiffs as will prevent the Court from dismissing the Bill on the application of one plaintiff, it is to be observed, that the mere circumstance that the rights of the plaintiff applying to be dismissed are concurrent with those of the plaintiffs who remain, will not be a sufficient reason for refusing the motion, since any defect which his withdrawal may make in the record may be supplied by making him a defendant by amendment. The objection in *Holkirk* v. *Holkirk* (*p*) arose from the circumstance that one of the plaintiffs applying to be dismissed was resident in France, which might have been difficult of proof, and the Court, therefore, refused to make the order, unless the plaintiff, who was applying to dismiss, would undertake to put in his answer to the Bill, when amended, within a fortnight after filing the amended Bill, and also unless the defendant already on the record would undertake not to object, at the hearing, that it was not proved that the other plaintiff was out of the jurisdiction.

***Secus* where the other plaintiffs will be injured.**

A plaintiff may move to dismiss his own Bill, *with* costs, as a matter of course, at any time before the decree; it is said, that, after witnesses have been examined, it is not to be prayed, except it be upon special cause (*q*); but this does not appear to be the present rule of practice (*r*). After a decree, however, the Court will not suffer a plaintiff to dismiss his own Bill, unless upon consent (*s*); for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it (*t*).

Plaintiff may apply at any time before decree;

but not after decree, unless upon consent.

(*n*) Bathew v. Needham, Prac. Reg. 179; Langdale v. Langdale, 13 Ves. 167.
(*o*) 4 Mad. 51.
(*p*) Ubi supra.
(*q*) Prac. Reg. 179.
(*r*) Carrington v. Holly, 1 Dick. 281.
(*s*) Guilbert v. Hawles, 1 Cha. Ca. 40.
(*t*) Carrington v. Holly, ubi supra.

After issue.

Secus where Court directs an issue, and plaintiff is unwilling to try it.

It is to be nevertheless observed, that if, upon the hearing of the cause, the Court has merely directed an issue, the plaintiff may, before trial of the issue, obtain an order to dismiss the Bill with costs; because the directing of an issue is only to satisfy the conscience of the Court prefatory to its giving judgment (*u*). If, however, the issue has been tried, and determined in favour of the defendant, the plaintiff cannot move to dismiss, because the defendant may have it set down on the equity reserved, in order to obtain a formal dismissal of the Bill, so as to enrol it as a final judgment, and thereby make it pleadable (*x*).

Sect. 2.—*On the Part of the Defendant.*

For want of prosecution.

Before replication.

If the plaintiff does not dismiss his Bill himself, or take any step in the cause, during the period above stated to be allowed him for considering his future proceedings, the defendant will be in a situation to move the Court that the Bill may be dismissed, as against himself, for want of prosecution, unless, indeed, his answer be accompanied by a demurrer or a plea, in which case, a defendant cannot, as we have seen, obtain an order to dismiss till the demurrer or plea has been disposed of, any more than he can where a demurrer (*a*) or a plea (*b*) has been put in unaccompanied by an answer.

Not till demurrer or plea have been disposed of.

According to the old practice.

According to the old practice of the Court, after the defendant had fully answered the Bill, although the plaintiff should take no step in the cause, the defendant was not entitled to call for a dismissal of the plaintiff's Bill for want of prosecution, until the expiration of three clear terms after the filing of the answer; but, by the 16th of Lord Lyndhurst's Orders, as amended in 1831, it is directed, that, where the answer of a defendant is to be deemed sufficient, whether it be in term time or in vacation, if the plaintiff or plaintiffs shall not proceed in the cause, the defendant shall be at liberty, *after the*

Under the New Orders.

(*u*) Carrington v. Holly, 1 Dick. 281.

(*x*) Ibid.

(*a*) Ante, p. 85.

(*b*) Ante, p. 221.

expiration of two months, to move, *upon notice*, that the Bill be dismissed, with costs, for want of prosecution; and that the Bill shall accordingly be dismissed, with costs, unless the plaintiff or plaintiffs shall do certain acts specified in the order, and which will be presently noticed.

Before replication.

It is to be noticed, that the months mentioned in the order are held to mean *lunar* months, and that the 19th order, which has been before quoted, does not apply to cases of this description; so that the intervention of the Trinity or Michaelmas vacation will not postpone the time for making the motion, where such vacations occur *after* the time when the answer is to be deemed sufficient (c).

Trinity and Michaelmas vacations not to be excluded.

The attention of the practitioner has been before called to the inconvenience which resulted from the clashing of the 16th order with the 13th and 19th orders, and to the remedy provided for it by the 26th of Lord Brougham's Orders (d), by which it is ordered, 'that a defendant shall not be at liberty to *serve* a notice of motion to dismiss a Bill for want of prosecution, until after the time limited by the rules of the Court within which a plaintiff may obtain an order to amend as to such defendant shall have expired' (e).

Not before time for amending has elapsed.

In order, therefore, to fix the precise time when a notice of motion to dismiss a Bill for want of prosecution may be served, it is necessary to ascertain whether the cause is in such a situation that it is no longer open to the plaintiff to obtain an order to amend the Bill as against the defendant on whose behalf the notice is to be given. For this purpose, it will be requisite to recur to the 13th of Lord Lyndhurst's Orders, the effect of which has been before discussed at some length (f).

By that order, we find that the plaintiff is entitled, after answer filed, to obtain, as of course, one order for leave to amend his Bill, &c., provided the same be obtained within six weeks after the answer, if there be only one, is to be deemed sufficient (g); consequently, a defendant cannot give

(c) Ante, p. 34.
(d) Ord. 1833.
(e) Ante, v. 1, p. 540.
(f) Ante, v. 1, p. 536.
(g) The 19th order applies to orders to amend; and, therefore, in calculating the time allowed for obtaining them, the vacations after Trinity and Michaelmas Terms are to be excluded.

Before replication.

notice of a motion to dismiss for want of prosecution, till the expiration of six weeks after the time when his answer is to be deemed sufficient.

But against that defendant only.

It is to be observed, that the 13th order allows the plaintiff time to obtain leave to amend, not only till six weeks have elapsed from the time of a defendant's own answer being deemed sufficient, but from the time when the answer of the last of the defendants shall be deemed sufficient. This, however does not extend to motions to dismiss; and, before the 26th of Lord Brougham's Orders was promulgated, it was held by Sir L. Shadwell, V. C., in several cases, that a plaintiff was entitled to move to dismiss, for want of prosecution, as soon as he could bring his own case within the 16th order, notwithstanding the time limited by the 13th order, from which the answers of the other defendants are to be considered sufficient, had not expired (*h*). And in *Gully* v. *Van Bodicoate* (*i*), which was decided after Lord Brougham's Orders had been promulgated, his Honor expressed himself as retaining the same opinion, observing, that the 26th order of 1833 was made merely to prevent a motion to dismiss being made where the time for amending had not expired *as against the defendant moving to dismiss.*

For information as to the effect of an order to amend, in preventing the motion to dismiss being made, the reader is referred to a former part of this treatise, where it has been fully discussed (*k*).

After leave given to amend at the hearing.

It may, however, be observed in this place, that if, upon the hearing of a cause, it is ordered to stand over, with liberty to the plaintiff to amend his Bill by adding parties, in pursuance of which the plaintiff amends, but does not proceed any further, the defendant may move specially to dismiss the Bill for want of prosecution, and is not bound to set the cause down again (*l*).

And it seems, that if the order allowing the cause to stand over, directs that it shall stand over for a limited time, within which the plaintiff is to add the necessary parties, in default

(*h*) Vide Swinfen v. Swinfen, 3 Sim. 384.
(*i*) 5 Sim. 668.
(*k*) Ante, v. 1, p. 541.
(*l*) Mitchel v. Lowndes, 2 Cox. 15.

of which the Bill is to be dismissed with costs, and the plaintiff does not add the parties within the limited time, no further application need be made to dismiss the Bill, as it is already out of Court (*m*).

Before replication.

It is to be remarked, that the 16th order prohibits a defendant from even *serving* a notice of motion to dismiss before the time for amending the Bill has elapsed. If, therefore, the notice be served before that time, an order made upon it will be irregular, although the motion be not actually made before the proper day (*n*). And it may be stated as a general rule, that if notice of motion to dismiss for want of prosecution be given for too early a day, the defect is not cured by the motion being accidentally postponed to a day when it might have been regularly made (*o*).

otice of motion cannot be *served* till the time for amending has expired.

Notice for too early a day not cured by waiting till the proper day before making the motion.

Although the 16th order of 1831 authorizes a defendant to move to dismiss the plaintiff's Bill, for want of prosecution, at the expiration of two months from the time when his answer is to be deemed sufficient; the defendant is not thereby authorized to make such a motion pending an abatement of the suit by the death, marriage, or bankruptcy of a plaintiff (*p*); and that, in reckoning the time when such application ought to be made, after revivor, the period during which the suit remained abated must be excluded from the calculation.

No order to dismiss during an abatement occasioned by the death of a plaintiff

It is to be noticed, however, that, in *Boddy* v. *Kent* (*q*), Lord Eldon held, that an order to dismiss, obtained pending an abatement of the suit occasioned by the death of one of several plaintiffs, ought not to be treated as a nullity; and that, therefore, an order to revive, made after such an order

Query, whether an order obtained during an abatement is a nullity?

(*m*) Vide Stevens v. Praed, 2 Cox. 374. It nowhere appears what the course of proceeding ought to be where a plaintiff obtains an order, at the hearing, for the cause to stand over, with liberty for him to amend his Bill, (but without any direction as to the Bill being dismissed in case of his not amending within the time specified in the order,) and omits to amend. It is presumed, however, that the defendant ought to move to have the Bill dismissed, as he must where a similar order has been made upon the argument of a demurrer for want of parties, and not acted upon.

(*n*) For further information as to the effect of orders to amend, upon the dismissal of a Bill for want of prosecution, vide ante, v. 1, p. 541.

(*o*) De Geneve v. Hannam, 1 R. & M. 494.

(*p*) Canham v. Vincent, V. C. June 14, 1838. 8 Sim.

(*q*) 1 Mer. 361.

Pending an abatement. had been pronounced, was irregular; and that, in doing so, his Lordship expressed himself as entertaining a different opinion from that of Lord Thurlow in *Sellers* v. *Dawson*(r), which has been before referred to. In that case, Lord Thurlow treated an order to dismiss a Bill for want of prosecution, which had been obtained during an abatement of the suit, occasioned by the bankruptcy of a sole plaintiff, as a nullity; and, upon that ground, refused to make any order, upon a motion on the part of the plaintiff, to discharge it; and, although the opinion of Lord Thurlow upon this point has been called in question by another judge of such eminence as Lord Eldon, it appears to the author to be capable of being sustained upon principle. The real question in *Sellers* v. *Dawson*(s) was, whether the bankruptcy of a sole plaintiff operated as a total abatement of the suit; and the opinion of Lord Thurlow was, that it did; and that, consequently, an order obtained during such an abatement was a nullity, and ought to have been so treated. Now, if we assume the doctrine laid down by Lord Thurlow, that the bankruptcy of a plaintiff occasions a total abatement of the suit, to be correct, it is very difficult to say what other course could have been adopted than the one he pursued. It so happened, that in *Sellers* v. *Dawson*, from the circumstance of the abatement having occurred by the bankruptcy of the plaintiff, the plaintiff, though *civiliter mortuus* with regard to his interest in the suit, was still personally in existence, and capable, if he had thought fit, of making a motion to discharge the order. But let us suppose, that the abatement had occurred by the death of a sole plaintiff, and that the defendant, either in ignorance of the fact, or for the purpose of obtaining an unfair advantage, had, before any representative had been constituted, moved to dismiss the Bill for want of prosecution. There clearly would in that case have been no person in existence who could have opposed the motion, nor, till the order to revive had been obtained, would there have been any person before the Court who would have been entitled to move for its discharge. It is difficult,

Semble, that it is.

(r) 2 Dick. 738; 2 Anst. 458(n). S. C.; ante, vol. 1, p. 79.

(s) Ubi supra.

Pending an abatement.

therefore, to conceive what else could have been done than to act as if an order to dismiss had not been obtained. It is clear, therefore, that, in the case of an abatement by the death of a sole plaintiff, an order to dismiss, made during the abatement, can only be a nullity; and that the rule in *Boddy* v. *Kent* (*t*), which says, that no order to revive can be made while an order to dismiss remains on the records of the Court, even though such an order was obtained irregularly during an abatement, will not apply. It may, however, be urged, that, in *Boddy* v. *Kent*, the abatement had occurred by the death of one of three defendants, and that, in that case, as well as in *Sellers* v. *Dawson*, there was still an individual before the Court who might have moved to discharge the order to dismiss before the order to revive was obtained; but it is submitted, that, in principle, no distinction is recognizable between an abatement occasioned by the death of one of several plaintiffs, and one occasioned by that of a sole plaintiff. In either case the abatement is total, and the cause as completely out of Court in the one case as in the other; so much so that, instead of reviving the original suit, the continuing plaintiffs may, if they please, abandon it altogether, and file a new Bill. It is besides to be recollected, that, in the ordinary order to dismiss a Bill for want of prosecution, the dismissal must be with costs to be paid to the defendant by the plaintiff; that part of the order, therefore, if the order be obtained during an abatement, whether occasioned by the death of a sole plaintiff or one of several plaintiffs, must necessarily be, in effect, a nullity, as no process could issue upon such an order, and no revivor could ever make that part of the order effective. Why, then, should such an order be considered as effective as to the dismissal of the suit, when it would be perfectly inoperative as to the material consequences of such dismissal, namely, the enabling a defendant to obtain his costs from the plaintiff? It is, therefore, as the author conceives, clear, that, in principle at least, an order to dismiss, pending an abatement, whether occasioned by the death of a sole plaintiff or of one of several plaintiffs, would be a nullity; and the same principle would also, he con-

(*t*) Ubi supra.

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ceives, apply to cases where the suit has abated by the bankruptcy either of a sole plaintiff or of one of several plaintiffs.

The writer has felt himself bound to make these observations for the purpose of directing the practitioner's attention to the difference of opinion which apparently exists between Lord Thurlow and Lord Eldon upon the point, whether an ordinary order to dismiss a Bill for want of prosecution, pending an abatement by the bankruptcy of the plaintiff, should or should not be treated as a nullity? and to the reasons which have led him to prefer the opinion of the former of those eminent judges.

Practice in case of bankruptcy of sole plaintiff.

It is material here to notice a fact which is of some importance to the practice of the Court, namely, that no difference of opinion appears to exist between the noble Lords before quoted, as to the irregularity of an order to dismiss being made, pending the bankruptcy, whether of a sole plaintiff or of one of several plaintiffs. The same opinion appears also to have been entertained by Sir Thomas Clarke, M. R., in *Hall* v. *Chapman* (*u*); and in *French* v. *Barton* (*x*), an application for such an order was refused by Lord Thurlow. It is true, in the latter case, an order was made, but it was not the order asked for, but another order, which the practice of the Court permits a defendant to obtain in cases where the suit has become abated by the bankruptcy of a plaintiff, namely, an order that the Bill shall be dismissed unless the plaintiff or his assignees file a supplemental Bill, for the purpose of bringing the assignees before the Court within a limited time (*y*). An order of this nature differs from an ordinary order to dismiss a Bill for want of prosecution in many particulars; amongst others, in the fact that it must be made upon motion of which notice has been given (*z*), which, before the 16th order of 1831, was not required before replication, and also in being made conditionally, viz., if the assignees omit to file a supplemental Bill within a limited time, and without costs (*a*). The principle upon which the distinction between this order

Reason of the practice.

(*u*) 1 Dick. 348.
(*x*) 18 Ves. 425 n.
(*y*) Wheeler v. Malines, 4 Mad. 17·.
(*z*) Porter v. Cox, 5 Mad. 80.
(*a*) Vide Sharp v. Hullet, 2 S. & S. 496; Randall v. Mumford; 18 Ves. 424; Porter v. Cox; 5 Mad. 80.

Pending an abatement.

and the ordinary order to dismiss for want of prosecution is founded, is very clearly laid down by Sir John Leach, V. C., in his judgment in *Sharp* v. *Hullett*(*b*). 'If,' he observes, 'when the plaintiff becomes bankrupt, it was permitted to the defendant to dismiss his Bill for want of prosecution, it would necessarily subject the bankrupt to the payment of costs when he has no means, which is against the general rule of this Court as to bankrupts: and it might be attended with this further inconvenience, that the Bill might be dismissed without the assignees knowing the fact that such a Bill was filed, and without any opportunity of judging, on their part, whether it would or would not be beneficial to the bankrupt's estate that the suit should be prosecuted. An order that the Bill should be dismissed without costs, within a limited time, if the assignees do not think fit to file a supplemental Bill, obviates both these objections, provided the notice of motion is served on the assignees.'

Will not apply to cases of abatement by death, or where one of several plaintiffs becomes bankrupt;

But, although the Court will, as we have seen, make an order of this nature, in cases of bankruptcy, it will not make such an order in the case of an abatement occasioned by the death of the plaintiff(*c*). And even in bankruptcy, the cases in which the order will be made are, it seems, confined to those in which the bankrupt is the sole plaintiff; it will not interfere in the same manner where he is one of several plaintiffs. This was held to be the rule by the learned judge above named, in *Caddick* v. *Masson*(*d*); and it is to be observed, that in *Adamson* v. *Hull*(*e*), the same learned judge was of opinion, that the rule which allowed such motions to be made in cases of the bankruptcy of a sole plaintiff, could not be extended to cases in which an abatement had occurred by the death of one of several plaintiffs. It is true, that the decision of Sir John Leach, in this case, was afterwards reversed by Lord Eldon(*f*); but it appears to the writer, that his lordship's judgment upon that occasion is by no means satisfactory; and, from the statement of it in the report, appears not to have been founded upon any

—or where one of several plaintiffs dies, *semble.*

(*b*) 2 S. & S, 496.
(*c*) Canham v. Vincent, 8 Sim.
(*d*) 1 Sim. 501.
(*e*) 1 S. & S. 249.
(*f*) Adamson v. Hall, Turn. & R. 258.

Pending an abatement.

precedent within his lordship's recollection. Besides which, it is to be observed, that one of the most experienced Registrars of the Court, (Mr. Walker,) had, upon the motion being made before the Vice-Chancellor, stated, that no order of such a nature had been made within his experience (g). It is to be observed, also, that, in *Adamson* v. *Hall* (h), the motion was made before the answer of the defendant was filed, and that in *Sharpe* v. *Hullett* (i), which was a subsequent case, Sir John Leach, V. C., expressed a doubt whether, in the case of an abatement by bankruptcy, such an application ought to be entertained at an earlier period than it could, according to the course of the Court, have been made for a dismissal of the Bill for want of prosecution, in case the plaintiff had not become bankrupt; and, at all events, his Honor intimated, that, when such an application should be made at an earlier period than could have been the case if the plaintiff had not become bankrupt, it would be for the Court to consider what ought to be the order which should then be made.

Whether it will [illegible] before or[illegible]ary time for [illegible]ving to dis[illegible]ss for want of [illegible]secution?

Bankruptcy of defendant will not prevent an order to dismiss.

It may be noticed in this place, that, although the bankruptcy of a plaintiff will prevent a defendant from obtaining the usual order to dismiss for want of prosecution, the bankruptcy of a defendant will not preclude such defendant from obtaining that order (k). And neither the bankruptcy or insolvency, nor the death, of one defendant will, it is apprehended, deprive the other defendants in the cause of their right to move, at the proper time, that the Bill may be dismissed as against themselves. The Court, however, will, as we shall see presently, exercise its discretion as to granting such a motion, and will not permit a plaintiff who has used all proper diligence in the prosecution of his suit to be prejudiced by an event over which he had no control.

Where defendant in contempt for non-payment of costs.

It is to be recollected, that a defendant who is in contempt for non-payment of the costs of an attachment for not putting

(g) 1 S. & S. 249.

(h) Ubi supra.

(i) Ubi supra.

(k) Monteith v. Taylor, 9 Ves. 615. In a recent case, the Vice-Chancellor, Sir L. Shadwell, made an order, on motion by the executor of a deceased defendant, that the plaintiff might revive the suit as against him within a month, or that the suit might be dismissed as against the deceased defendant. Burnell v. Duke of Wellington, 6 Sim. 461, sed vide Canham v. Vincent, 8 Sim.

in his answer in due time, will not be in a situation, even after answer, to move to dismiss the Bill till he has paid the costs, unless the plaintiff has taken an office-copy of the answer, by which he will have waived the contempt, and precluded himself from enforcing the payment of the costs of the attachment by the usual process (*l*).

How prevented. Disability removed by acceptance of answer.

The 16th order of 1831 permits a defendant to move to dismiss the Bill, in those cases only in which the plaintiff or plaintiffs shall not have proceeded in the cause for two months after the time when the answer is to be deemed sufficient; it is necessary, therefore, to inquire, what will be a sufficient proceeding in the cause to prevent the motion.

What will be sufficient proceeding in the cause to prevent motion.

Under the old practice of the Court, a defendant was entitled, after the expiration of the proper time from the filing of his answer, to obtain an order to dismiss the plaintiff's Bill, upon motion of course, no formal notice of motion being required (*m*). In seems, however, to have been the custom of the Clerks in Court, as a matter of curtesy between themselves, that the defendant's Clerk in Court should, previously to moving to dismiss, hand over a notice in writing of his intention to make the motion to the plaintiff's Clerk in Court (*n*). By this means, the plaintiff gained an opportunity of keeping his Bill in Court, either by obtaining an order to amend his Bill, or by filing a replication to the defendant's answer. Lord Eldon, however, repeatedly expressed his disapprobation of this practice; his Lordship being of opinion, that, after a defendant had been kept in Court long enough, after his answer, to entitle him to get the Bill dismissed, the Court ought to relieve him by dismissing him (*o*). The practice, nevertheless, appears to have been continued; and it seems, that the same course of proceeding may still be resorted to, and that the plaintiff may effectually avoid the operation of the 16th order, by taking advantage of the time which elapses between the service of the notice and the making of the motion, to file a

Filing a replication.

—which may be done after notice of motion.

(*l*) Ante, v. 1. 663.
(*m*) Atty.-General v. Finch, 1 V. & B. 368.
(*n*) 1 Turn. & V. 617.
(*o*) Day v. Snee, 3 V. & B. 170; vide etiam Jackson v. Purnell, 16 Ves. 204; James v. Biou, 3 Swanst. 245; Degraves v. Lane, 15 Ves. 291.

How prevented. replication. A case of a similar nature occurred under the old practice, where, an injunction having been obtained, the defendant gave notice of a motion that the injunction might be dissolved, and that the Bill might be dismissed for want of prosecution. After the notice had been served (*p*), but before the motion was made, a replication was filed, and the Vice-Chancellor, (Sir John Leach,) held, that, as the replication was filed before the motion was made, the motion could not be sustained; but, inasmuch as the replication was filed subsequently to the notice of motion, his Honor gave the defendant his costs. The same opinion seems to have been entertained by Sir L. Shadwell, V. C., in *Earl Ferrars* v. *Shirley* (*q*), which occurred since the 16th order was amended. In that case, the defendant had served a notice of motion to dismiss the plaintiff's Bill for want of prosecution, but, on the following day, the plaintiff filed a replication, and the motion was, consequently, not made, so that the usual undertaking was not entered into by the plaintiff. The plaintiff did not, after his replication had been filed, serve a subpœna to rejoin, which, under the 16th order, he ought to have done, within three weeks from that time (*r*); whereupon the defendant again moved, upon notice, to have the Bill dismissed, with costs. The motion was resisted, on two grounds, 1st, because, being made after replication filed, it did not fall within the 16th order; and, 2dly, because the replication having been filed after service of a notice of motion to dismiss, it did not fall within the 17th order, which applies, in terms, to those cases only where the plaintiff files a replication without having been served with notice of motion to dismiss; and the Court concurred in this view of the case, and held, that, as neither of the orders applied, the case, was to be decided according to the old practice of the Court.

It certainly does not appear, from the report of the above case, what the precise ground of the Vice-Chancellor's decision was; viz., whether his reason for thinking it did not come within the 16th order was, because the undertaking required by that order was not entered into, and, therefore, no default had been made, which would entitle the plaintiff to apply to

(*p*) Spurrier v. Bennett, 4 Mad. 39; vide etiam Anon. 14 Ves. 492.

(*q*) 7 Sim. 484.

(*r*) Ord. 1831. XVII.

the Court to dismiss the Bill; or because the circumstance of the replication having been filed before the motion had been actually made, took the case out of the operation of the order. There can be little doubt, however, that, under the words of the 16th order, the latter reason would have been a sufficient one for refusing the motion; and that a plaintiff may, by filing a replication after notice of a motion to dismiss, prevent the motion being made, and thereby obtain all the delay which it appears to have been the object of the original framers of the 16th order to avoid (*s*).

How prevented.

It is to be observed, that, under the 16th order as originally promulgated, the same difficulty did not arise. The order, as first framed, required the plaintiff, if he wished to avoid a dismissal of his Bill, to file his replication forthwith, and to appear, upon the motion being made, and give an undertaking to speed the cause with effect in the usual form; so that the filing of the replication before the motion should be made was, by the order, rendered necessary as a previous step, and did not form any part of the undertaking to speed the cause. But by the amended order, the undertaking to be entered into by the plaintiff upon the motion being made, embraces the filing of a replication; so that it evidently cannot be intended to apply to a case in which the replication has been filed before the motion is actually made (*ss*). This is, in fact, rendered still more evident from the form of the order for the dismissal of the Bill made in pursuance of the notice, which, as we shall see presently, is always drawn up upon the production of the Clerk in Court's certificate of the proceedings already had in the cause, by which the circumstance of a replication having been filed would appear, and so render the order irregular upon the face of it.

Consequences of filing replication.

According to the old practice of the Court, alluded to by the Vice-Chancellor in *Earl Ferrers* v. *Shirley* (*t*), (and which, it is presumed, is the practice which must still be resorted to, in cases where a plaintiff takes the step of filing a replication after notice of the motion to dismiss is given, but before it is made,)

(*s*) Chan. Rep. p. 13.

(*ss*) *Quære?* whether it would not be advisable to restore the 16th order, in this respect, to its original form. Vide post, 376 n.

(*t*) Ubi supra.

How prevented. the defendant will not be in a situation again to move to dismiss the Bill for want of prosecution (u) till after the expiration of three clear terms from the filing of the replication (x). The motion must then be made, *upon notice*, and the plaintiff may again prevent its effect by giving the ordinary undertaking to speed his cause, which will have the effect of delaying the dismissal for one term next after the order to speed the cause has been made, before which time the defendant cannot again move to dismiss (y). Upon the expiration of that time, the defendant must again give a notice of a motion to dismiss, and then, and not till then, will the Court, (upon affidavit of the service of the notice of motion, and the production of the order to speed the cause, together with the certificate of the Clerk in Court that no proceedings have been had, make a peremptory order for the dismissal of the Bill, with costs, to be taxed by one of the Masters of the Court, unless the plaintiff appears, and undertakes to give the rules to produce witnesses and pass publication in the course of the ensuing term, and to set the cause down for a hearing in the term after; in which case, unless the condition be complied with, the cause will stand dismissed out of Court without any further motion (z).

It may be observed, that, under the old practice of the Court, a replication, filed even on the same day that an order to dismiss the Bill for want of prosecution was obtained, would have precedence of the order to dismiss, and render it irregular (a). Whether such would be the effect of a replica-

(u) The defendant may, however, obtain the costs of the motion to dismiss. Vide Spurrier v. Bennett, 4 Mad. 39.

(x) Earl Ferrers v. Shirley, ubi supra; 1 Turn. & V. 619; 1 Harr. ed. Newl. 314; Farquharson v. Seton, 1 Turn. & R. 378.

(y) It was formerly considered, that the *term*, in cases of this nature, comprised not only the term, but *the vacation after it*. Vide Margleman v. Prosser, 3 Bro. C. C. 191, and Findlay v. Wood, 1 V. & B. 499. This, however, appears to have been a misapprehension, arising from an inaccuracy in Mr. Brown's report of Margleman v. Prosser, vide S. C. 3 Bro. C. C. ed. Belt, 191 notis, and the rule of the Court now is, that the plaintiff, on such a motion as this, is entitled only to the term, and not to the vacation. Wilson v. Timpson, 2 Mad. 123; Turner v. Seddon, cited ibid., and Holtzaphell v. Baker, ibid. notis. Vide etiam Farquharson v. Seton, ubi supra.

(z) 1 Turn. & V. 619, 620.

(a) Reynolds v. Nelson, 5 Mad. 60. In the Court of Exchequer, a replication filed on the same day of shewing cause against dismissing a Bill, is irregular; Christie v. De Tastet, 1 Price, 243.

tion filed on the same day that the motion to dismiss is made, under the new practice, is undetermined.

How prevented.

By a proceeding in the cause.

With respect to what other proceeding, besides that of filing a replication, may be considered as *a proceeding in the cause* which will prevent a motion to dismiss being made, it is to be understood, that it must be such a proceeding as forwards the progress of the suit towards a hearing. Therefore, the obtaining an order upon an interlocutory application is not, in general, considered as a proceeding in the cause. Upon this ground, it has been long settled, that an injunction will not prevent the defendant from moving to dismiss for want of prosecution (*b*); and that even the obtaining an injunction, upon merits confessed in the answer, will not be such a proceeding in the cause as will save a plaintiff from having his Bill dismissed (*c*). The same has been held of shewing cause, successfully, against dissolving an injunction (*d*); and an order to dismiss a Bill for want of prosecution was held to be regular, although made after a notice had been given by the defendant of a motion to dissolve an injunction, which motion was not made, in consequence of the state of business in the Court (*e*).

Interlocutory application no proceeding.

Secus an order of reference as to title.

There is one case, however, in which an order made upon an interlocutory application is considered as a sufficient proceeding to prevent the dismissal of a Bill for want of prosecution, viz., where the Bill having been filed for the specific performance of a contract and the title only being in dispute, a reference has been made to the Master, upon motion, to inquire into the title, upon which the Master has not reported (*f*). In such case the order is considered as in the nature of a decree made upon the hearing of the cause, and will prevent the dismissal of the Bill (*g*).

Or a reference for impertinence.

It seems, that, under the old practice, an order to dismiss would not have been regular, if obtained by a defendant pending a reference of his answer for impertinence, the reason of

(*b*) Day v. Snee, 3 V. & B. 170; James v. Biou, 3 Swanst. 234.

(*c*) Bliss v. Collins, 2 Mer. 62, cited.

(*d*) Earl of Warwick v. Duke of Beaufort, 1 Cox. 111.

(*e*) Farquharson v. Pitcher, 3 Russ. 383.

(*f*) Biscoe v. Brett, 2 Ves. & B. 377.

(*g*) Ibid.

How prevented.

which was that a plaintiff had a right to have the impertinent matter expunged before he replied to the answer (*h*). If, however, the plaintiff, after obtaining a reference of the answer for impertinence, neglected to proceed upon it, the defendent might apply to have the order discharged, and to have the Bill dismissed for want of prosecution (*i*). It is probable, that, under the present practice, it will still be held, that as no time is limited within which a reference of an answer for impertinence must be obtained, provided it be obtained before replication, the existence of such an order will be considered as a good reason why the defendant should not be at liberty to move to dismiss the Bill (*k*). We have seen before, that the New Orders have provided, that an order for referring any pleading for impertinence will be considered as abandoned, unless the party obtaining it shall procure the Master's report within a certain time (*l*); consequently there will be now no occasion, in case the plaintiff neglects to proceed upon the order, to move to have it discharged, and the defendant may, (provided the cause is otherwise in a situation to permit it) immediately upon the time, limited by the order, having expired, apply, to have the Bill dismissed under the 16th order.

Certificate of Clerk in Court.

It has been before stated, that the order to dismiss a Bill can only be drawn up on the production of the Six Clerk's certificate of the proceedings in the cause, for the purpose of shewing, that, since the answer was filed, no further proceedings have been had. This certificate ought, in strictness, to be produced at the time of the motion being made; the practice, however, has become general, of producing it, afterwards, to the Registrar, who will not draw up the order until he sees that the certificate has been granted and properly filed (*m*). The consequence of this practice is, that the certificate is frequently applied for, and obtained, after the order has been pronounced by the Court; and, consequently, it bears a date subsequent to that of the order, (which, although drawn up

(*h*) Railton v. Woolrick, 3 Swanst. 247, (n.); vide etiam Goodwin v. Davis, 1 Pri. 373.

(*i*) Railton v. Woolrick, ubi supra.

(*k*) Ante, p. 296.

(*l*) Ante, v. 1, p. 457.

(*m*) Wills v. Pugh, 10 Ves. 402, 403.

and entered afterwards, is always dated on the day that it was pronounced by the Court.) This, however, has been held not to occasion any irregularity in the order (*n*); but the Clerk in Court must be careful, in giving the certificate, not to refer in it to any proceeding which has taken place in the cause subsequently to the motion; otherwise the registrar may refuse to draw up the order upon snch certificate (*o*).

Consequences of.

Where a defendant served notice of a motion to dismiss, and, before the time for making it, the plaintiff's Clerk in Court gave notice that a replication was filed; in consequence of which the motion was not made, but it afterwards appeared that no replication had been filed; whereupon the defendant again moved to dismiss the Bill, and obtained the order: upon the plaintiff's applying to discharge that order for irregularity, in consequence of a replication having been filed before it was made, Lord Eldon refused to discharge it, unless the plaintiff would answer the defendant's affidavit, and pay the costs of the motion (*p*).

Consequence of the motion.

Having in the preceding pages, endeavoured to point out the cases in which a defendant may or may not apply for an order to dismiss the Bill for want of prosecution, we shall now proceed to consider the consequence of such an application when made.

The 16th order directs, that, *upon the motion to dismiss the Bill being made, the Bill shall accordingly be dismissed with costs, unless the plaintiff or plaintiffs shall appear upon the motion, and either enter into one of the special undertakings therein mentioned, or satisfy the Court that the plaintiff is unable to proceed, for the reasons set forth in the order.* If, therefore, the plaintiff, upon the motion to dismiss being made, wishes to keep the cause in Court, he must, according to the 16th order (*q*), appear upon the motion, and do one of the three following things, viz.: 1. Give an undertaking to file a replication, and serve a subpœna to rejoin, (and, in case he requires a commission to examine witnesses, serve an order for

(*n*) M'Mahon v. Sisson, 12 Ves. 465; Atty.-General v. Finch, 1 V. & B. 368.

(*o*) King v. Noel, 5 Mad. 13.

(*p*) Anon. 14 Ves. 492.

(*q*) Ord. 1831.

Consequences of.

such commission,) within three weeks from the date of such undertaking; or, 2dly, give an undertaking to hear the cause, as against the defendant making the motion, upon Bill and answer; or, 3dly, make it appear to the Court that the plaintiff or plaintiffs is or are unable to proceed in the cause, by reason of some other defendant or defendants not having sufficiently answered the Bill, and that due diligence has been used to obtain a sufficient answer or answers from such other defendant or defendants; in which case the Court will allow to the plaintiff or plaintiffs such further time for proceeding in the cause as shall appear to the Court to be reasonable.

In what cases plaintiff will be entitled to further time.

In considering these several causes which may be shewn by the plaintiff against the dismissal of his Bill, the order in which they are above stated will, for the sake of convenience, be inverted; and, before the reader's attention is drawn to the nature of the undertakings which the plaintiff must enter into to avoid the effect of the order, the effect of that part of the order which authorizes the Court, upon its being made to appear that the plaintiff is unable to proceed with the cause &c., to allow further time for proceeding with the cause will be considered.

Where other defendants have not answered.

The first thing which a plaintiff has to shew to entitle him to such an indulgence, is, that he is unable to proceed with the cause, *by reason of some other defendant or defendants not having sufficiently answered the Bill;* the second is, *that he has used due diligence to obtain a sufficient answer or answers from such other defendant or defendants.*

Previously to the propounding of the above order, the rule of the Court was, that where there were two or more defendants, one of whom had put in his answer, so as to be in a situation to move to dismiss the Bill for want of prosecution, he might make a motion to that effect, and thereby compel the plaintiff to enter into the usual undertaking to speed the cause, although the other defendants stood out process of contempt for want of their answers, and the cause could not be prosecuted with effect without them (*r*). This rule, however, was frequently productive of much hardship to the suitors, as it often happened that one defendant was in a situation to pro-

(*r*) Anon. 9 Ves. 512.

cure the dismissal of the Bill, before the plaintiff, notwithstanding the exertion of the utmost diligence, had been able to compel the other defendants in the cause to answer the Bill, or even to procure an order to take the Bill *pro confesso* against them. It was to obviate this inconvenience that the 16th order of 1831 was framed, so as to enable a plaintiff to answer the application to dismiss, when made by one defendant, by shewing, that other defendants had not yet put in their answers.

Consequences of.

Plaintiff must shew that he has used due diligence to get in the answers.

In order, however, to prevent any *laches*, on the part of the plaintiff, in getting in the answers of all the defendants to his Bill, so as to place himself in a situation to go on with the cause, the order requires the plaintiff to satisfy the Court, not only that he is unable to go on because some of the defendants have not answered, but also that he has used due diligence to obtain such answers from the other defendants.

What will be considered as due diligence.

With respect to what may be termed due diligence in procuring an answer from the other defendants, that must necessarily depend upon the circumstances of each case. It is necessary, however, in order to make out a case of due diligence, that the plaintiff should shew that, where it has been in his power to do so, he has resorted to the usual process of the Court to compel an answer; and where the plaintiff's solicitor made an affidavit that he had frequently called upon the Clerk in Court for the defendants who had not answered, and threatened an attachment, but had not issued one, the Court was of opinion, that an attachment ought to have been issued (s).

Where the plaintiff has not been in a situation to use the process of the Court for the purpose of compelling the answer, he cannot, of course, shew that such process has been issued; in that case it will be sufficient if he satisfies the Court that the cause is in such a state that no process could be issued; and, therefore, where the Bill has been amended against the other defendants, and such defendants have been served with a *subpœna* to answer the amended Bill, the circumstance of their time for answering the amended Bill

Where other defendants have not answered amendments.

(s) Gully v. Van Bodicoate, 5 Sim. 668.

Consequences of.

not having expired, will be a sufficient reason for not dismissing the Bill (*t*). So, if one of the other defendants has died without answering the Bill, and the plaintiff has had no opportunity of reviving the suit against his representatives, either from the circumstance of no representatives having been constituted, or from their not having been constituted in sufficient time to enable the plaintiff to obtain an order to revive against them, in such case, it is apprehended, the Court will allow the plaintiff sufficient time to enable him to get the representatives before the Court. He must, however, in a case of that nature, shew that, previously to the abatement of the cause, due diligence was not wanting, on his part, to procure the answer of the original defendant.

In what cases the Court will exercise its discretion.

It may be here noticed, that, notwithstanding the 16th order directs, that, upon the motion being made, the Bill shall be dismissed, unless the plaintiff does one of the three things there mentioned; the Court has frequently exercised a discretion upon the subject not strictly warranted by the terms of the order. Thus, where, upon a motion to dismiss being made, it appeared that a motion as to the production of a letter mentioned in the answer was still pending before the Lord Chancellor, (no *laches* having, as it appeared, taken place in making it,) Sir L. Shadwell, V. C., was of opinion, that sufficient cause was shewn against the dismissal of the Bill, and refused to make any order (*u*).

So where two defendants moved to dismiss for want of prosecution, and it appeared, that, before they were entitled to make the motion, another defendant had been committed to prison for debt, and had presented a petition for his discharge under the Insolvent Debtors' Act, *upon which there had been no final adjudication, and he remained in custody,* but that a person had been appointed assignee of his estate *ad interim;* the Vice-Chancellor was of opinion, that, inasmuch as the assignment

(*t*) Partington v. Baillie, 5 Sim. 667. It is to be observed, that, in the above case, the Vice-Chancellor did not, in pursuance of the 16th order, allow the plaintiff such further time for proceeding in the cause as should appear to the Court reasonable, but he dismissed the motion, *with costs,* upon the ground that the solicitor for the defendant on whose behalf the motion was made, was also the agent for the other defendant, and must, therefore, have known that the motion could not succeed.

(*u*) Vent v. Pacey, 3 Sim. 383.

to the *ad interim* assignee would, under the act, become void, in the event of the defendant's petition being dismissed, the plaintiff was not bound to proceed in the cause until there had been a final adjudication upon the petition (*x*).

Consequences of.

It seems, also, that the Court will sometimes, where the plaintiff succeeds in satisfying it that the order to dismiss the Bill for want of prosecution should not then be made, direct the motion to stand over till a particular day, when the defendant may renew it. Thus, where a defendant moved to dismiss for want of prosecution, and the plaintiff, in answer to the application, satisfied the Court that it was necessary to add new parties to the Bill, and accounted for the delay which had taken place in bringing those parties before the Court, the Court, instead of dismissing the Bill, ordered the motion to stand over, giving the plaintiff, by the same order, liberty to make the necessary amendments in the Bill (*y*) And when the defendants, afterwards, upon the amendments being made, renewed the motion to dismiss, the Court, under the circumstances, and to enable the plaintiff to complete the record, directed the motion again to stand over (*z*). Sometimes, also, the Court contents itself with making no order whatever upon the motion to dismiss (*a*); and where it thought that the defendant's solicitor had conducted himself improperly in giving the notice to dismiss at a time when, from his knowledge of the cause as solicitor for other defendants, he must have been aware that it could not succeed; it has gone the length of dismissing the motion with costs (*b*). With reference to this subject, however, the author cannot help submitting, with the greatest humility, that, in the above cases, the Court has acted with a degree of lenity towards the plaintiff not exactly warranted either by the terms of the 16th order or by the former practice of the Court. The cases in which the 16th order permits any other order to be made than

Course of proceeding when Court thinks plaintiff entitled to indulgence.

(*x*) Lacey v. Lacey, 11th March, 1835, cited in Cooke's New Orders, 42.

(*y*) Hollings v. Kirkby, V.C., 11th March, 1835, cited in Cooke's New Orders, 43.

(*z*) Ibid. 17th July, 1835, cited ibid.

(*a*) Vent v. Pacey, 3 Sim. 383.

(*b*) Partington v. Baillie, 5 Sim. 667.

Of the undertaking to set the cause down upon Bill and answer.

that of dismissing the Bill with costs, are strictly limited to those in which the plaintiff shall either enter into one of the undertakings therein specified, or shall satisfy the Court that he is unable to proceed with the cause for the reasons therein specified; whilst the old practice of the Court permitted no answer to be given to a motion to dismiss, other than an undertaking to speed the cause, and required the plaintiff, if he had any special circumstances to allege why the Bill should not be dismissed, to make them the ground of a special application to the Court (*c*).

If plaintiff not entitled to indulgence.

If the plaintiff is not in a situation to obtain the indulgence of the Court upon any of the grounds above stated, the only alternative he has is to appear upon the motion, and give one of the undertakings mentioned in the order, *i. e.*, either to hear the cause as against the defendant making the motion, upon Bill and answer; or to file a replication, and take the other proceedings consequent thereupon, within three weeks from the undertaking being given.

The usual undertaking must be given.

It may be observed here, that the regular way in which an undertaking of this nature should be given, is, by the plaintiff's Counsel appearing in Court at the time of the motion being made.

May be left at Registrar's office.

It seems, however, that an undertaking signed by Counsel, and left at the Registrar's office on the same day that the motion to dismiss is made, will be sufficient (*d*).

Of the undertaking to set the cause down upon Bill and answer.

1. With respect to the first undertaking, namely, *to set the cause down for hearing against the defendant making the application, upon Bill and answer only;* there does not appear to be any time limited within which this undertaking is to be performed; nor is any mode pointed out by the order, by which the defendant may compel the plaintiff to set the cause down in pursuance of it. It is presumed, however, that if any unreasonable delay were to take place in the performance of the undertaking by the plaintiff, the Court would entertain a motion, on the part of the defendant, requiring the plaintiff to set the cause

(*c*) Lyon v. Dumbell, 11 Ves. 608; Bligh v. ——, 13 Ves. 455. Vide etiam Christie v. De Tastet, 1 Pri. 242, where the same rule appears to prevail in the Court of Exchequer.

(*d*) Lyndon v. Lyndon, 3 Mad. 240.

down at a particular day, or, in default, to have the Bill dismissed as against the defendant applying, with costs. It is right, however, to state, that no case of an application of this description occurs in any of the books.

Of the undertaking to speed.

It is to be noticed, that in a case which occurred before the New Orders, in which a plaintiff, who was under an undertaking to speed the cause, had been permitted to withdraw his replication, and to set the cause down upon Bill and answer, did so, but omitted to serve a subpœna to hear judgment, or to appear when the cause was called on; it was held, that the undertaking to set the cause down was equivalent to service of the subpœna; and the Bill was, therefore, dismissed with costs (*e*). It seems, however, that, in general, the words, 'setting down the cause,' embrace serving the subpœna to hear judgment (*f*).

Includes service of subpœna to hear judgment.

2. With respect to the other undertaking, namely, *to file a replication*, and take the other proceedings consequent thereon, which is usually termed '*an undertaking to speed the cause*,' the 16th Order is more explicit. It directs, that the plaintiff shall appear upon such notice, and give *an undertaking to file a replication, and serve a subpœna to rejoin, and in case he requires a commission to examine witnesses, shall obtain and serve an order for such commission, within three weeks from the date of such undertaking*. It afterwards goes on to direct, that, in case the plaintiff or plaintiffs do appear upon the motion to dismiss, and give the undertaking to file a replication and take the other proceedings consequent thereon, thereinbefore required, then all the rules and regulations with respect to the commission and the return thereof, and the setting down the cause for hearing, and the rights of the defendant with respect to the commission, in case of any default on the part of the plaintiff, which are particularly expressed in the next Order, (Ord. XVII.,) shall apply to the cases under that Order.

Of the undertaking to speed the cause.

Upon the undertaking required by the above general order being given, the order is usually drawn up in the following

Nature of it.

(*e*) Rogers v. Goore, 17 Ves. 130. (*f*) Dixon v. Shum, 18 Ves. 520.

Of the undertaking to speed.

Form of the order.

form, viz., '*That the plaintiff do file a replication and serve subpœnas to rejoin, and obtain and serve an order for a commission to examine witnesses, if he requires such commission, within three weeks from this time, and give rules to produce witnesses and pass publication in —— Term, (the term next but one after the order,) and set down the cause for hearing, and serve subpœnas to hear judgment in —— Term next, (the third term after the date of the order,) or, in default thereof, that the plaintiff's Bill do stand dismissed out of this Court with costs, the plaintiff to pay to the defendant the costs of this application; to be taxed by the Master in rotation, in case the parties differ.*'

What will be a compliance with it.

It is to be remarked, that the above form goes beyond the terms of the undertaking required by the 16th Order in directing publication to pass, and the cause to be set down at particular periods, &c.; these terms are inserted in compliance with the 17th Order, which, as we have seen, is, as to those points, directed to apply to cases where the plaintiff shall enter into the undertaking to speed the cause directed by the 16th Order. It is not, however, to be understood that a plaintiff is bound to set the cause down for hearing, and to give rules to pass publication, &c., within the periods expressed, in any other cases than those in which he requires a commission to examine witnesses. If he does not require such a commission, he will fulfil the undertaking by merely filing his replication; he is not, in that case, bound even to serve a subpœna to rejoin before the time allowed him for that purpose by the old practice. This was decided by the Vice-Chancellor in *Daniell* v. *Austen* (a), in which case the plaintiff, having given the undertaking prescribed by the 16th Order, filed a replication, but did not serve a subpœna to rejoin within three weeks from the date of his undertaking, in consequence of which the defendant served him with another notice of a motion to dismiss the Bill, and the plaintiff then, *and before the motion was made*, served the defendant with a subpœna to rejoin. Upon this second motion to dismiss being made, it was contended that the plaintiff was bound, under the 16th Order, to serve a subpœna to rejoin within three weeks from

Where plaintiff does not require a commission to examine witnesses.

(a) 8 Sim. 19.

the date of his undertaking; but the Vice-Chancellor said, that as the plaintiff did not require a commission, the limit of three weeks did not apply, and that, as the plaintiff had served the subpœna to rejoin, within the time required by the old practice, the motion must be refused. The consequence of this decision is, that the plaintiff appearing upon a motion to dismiss, and entering into the usual undertaking required by the 16th Order, stands precisely in the situation which a plaintiff filing a replication, under the old practice, stood in, and that he will be entitled to three terms, exclusive of the term in which his replication has been filed, to serve his subpœna to rejoin (*b*).

Of the undertaking to speed.

(*b*) Ante, p. 368. Without presuming to call in question the correctness of this determination, the writer cannot forbear directing the attention of those with whom the regulation of the practice of the Court rests, to the unsatisfactory state of it, with regard to the dismissal of Bills, as it stands upon the present decisions. The determination in *Daniell* v. *Austen* has proceeded upon the ground that the limit of three weeks, within which the plaintiff, in order to prevent a dismissal, is, by the 16th Order of 1831, required to do certain things therein specified, is not applicable to cases in which the plaintiff does not require a commission; and in this respect the opinion of the Vice-Chancellor has been confirmed by that of Lord Cottenham in *Smith* v. *Oliver*, (3 M. & C. 165,) which, although decided with reference to the effect of the 17th Order, is equally applicable to the 16th Order, the wording of both Orders being precisely the same. The effect of this construction, however, is to leave *the time within which the plaintiff is to file a replication pursuant to his undertaking completely indefinite.* The general notion previous to *Daniell* v. *Austen* was, that the time for filing the replication, as well as serving a subpœna to rejoin, pursuant to the 16th Order, was *within three weeks from the time of entering into the undertaking*. (Vide *Carden* v. *Manning*, 1 Keen, 380; 1 Smith's Ch. Pr. 321, 335.) This proceeded upon the supposition that the three weeks, limited by the 16th Order, applied to all the acts which the plaintiff binds himself, by his undertaking, to do, viz. to file a replication and serve a subpœna to rejoin, and (in case he requires a commission to examine witnesses) to obtain and serve an order for such commission; but as it has been decided, by the above case, that the period of three weeks applies only to the latter branch of the undertaking, viz. to the obtaining and serving an order for a commission, and not to the preceding one, viz. to the serving a subpœna to rejoin; it follows of course that it cannot apply to the first, viz. to the filing of a replication; and as there are no other expressions in the 16th Order to limit the period within which a replication must be filed, the consequence is, that there is no time fixed within which the plaintiff, if he does not require a commission to examine witnesses, is bound to perform the undertaking he enters into under the 16th Order, so far, at least, as relates to the filing of his replication. For although the old practice of the Court furnishes a period within which a plaintiff, having replied, must serve a subpœna to rejoin, which, according to *Daniell* v. *Austen*, is the period to be adopted under the New Or-

Of the undertaking to speed.

It does not distinctly appear, from any of the cases, whether, if the plaintiff omits to serve the subpœna to rejoin within the time limited by the old practice, the defendant may then have a peremptory order to dismiss, or whether the plaintiff will be allowed then to enter into the ordinary undertaking to speed, in the manner before pointed out (*c*). It is presumed, however, that as his undertaking was to serve a subpœna to rejoin, a peremptory order to dismiss will then be made.

If the plaintiff should serve a subpœna to rejoin before the defendant moves to dismiss the Bill, the defendant will be pre-

ders, no such period can be found which, either positively or by analogy, is applicable to the filing of a replication under such circumstances. This is a state of practice which was obviously not contemplated by the Commissioners who recommended the adoption of the 16th Order, nor by those under whose superintendence that Order was amended in 1831; but it is the necessary result of the construction put upon the 16th Order by the decision in *Daniell* v. *Austen*, and of the principles upon which the 17th Order had been interpreted in *Crooke* v. *Trery*, (3 M. & C. 168.) It is therefore submitted, with the greatest deference, either that the 16th Order should be again amended, or that a new Order should be framed pointing out more distinctly, than is done at present, the terms of the undertaking to be entered into by the plaintiff in order to prevent the dismissal of his Bill for want of prosecution. The same observation will apply to the order drawn up by the Registrars upon the plaintiff's appearing upon the motion to dismiss, and entering into the usual undertaking, which, although framed in conformity with the terms of the 16th General Order, certainly leaves the plaintiff very much in the dark as to what he is required to do in pursuance of it, particularly with reference to that part of it which comprises the conditions introduced from the 17th Order, which, according to *Williams* v. *Janaway*, (6 Sim. 77,) and *Crooke* v. *Trery* (ubi supra,) do not apply to any other case than that of a plaintiff who requires and sues out a commission to examine witnesses. If the writer might venture a suggestion upon the subject, it would be, that the 16th Order should be again altered, so that the undertaking to be entered into by the plaintiff, upon a motion to dismiss, should be either to set the cause down for hearing, against the defendant applying to dismiss, upon Bill and answer, or else to file a replication, and limiting the period within which the undertaking in either case is to be performed. The 17th Order might also be amended by omitting the words, 'that where the plaintiff files a replication without having been served with notice of a motion to dismiss the Bill for want of prosecution,' and substituting for them, 'That where a plaintiff, having filed a replication, requires a commission to examine witnesses, he shall serve a subpœna to rejoin, and obtain and serve an order for such commission, within three weeks from the filing of such replication, &c.' By this simple alteration, the 17th Order will not only be made more intelligible, but will be rendered applicable to all cases where the plaintiff requires a commission, whether he shall have filed a replication in pursuance of an undertaking entered into under the 16th Order or in the ordinary course.

(*c*) Ante, p. 368.

vented from again moving to dismiss the Bill for want of prosecution (*g*); but he must adopt the course of proceeding pointed out in the following certificate, delivered by the late Mr. Jackson, one of the Clerks in Court, to Sir John Leach, in February, 1820;—

Of undertaking to speed.

'If the plaintiff has served a subpœna to rejoin, which he will do to prevent the defendant moving to dismiss, the defendant is from that time precluded from moving to dismiss the plaintiff's Bill for want of prosecution. The defendant must then wait one clear term after the subpœna to rejoin was served, when he must give rules to produce witnesses. He must then wait another clear term, when he must give rules to publish depositions, although not any witnesses have been examined. This is compulsory process. The defendant must then wait another clear term, when he may set the cause down to be heard, at his own request, and must serve the plaintiff with a subpœna to hear judgment (*h*).'

Proceeding where plaintiff requires a commission.

If a plaintiff who has entered into the above undertaking requires a commission, he must obtain and serve the order for it within the same period of three weeks from the date of the order to dismiss He cannot, however, be compelled to do so; and where a plaintiff had appeared upon a motion to dismiss his Bill for want of prosecution, and entered into the usual undertaking; and, in pursuance thereof, had filed his replication and served a subpœna to rejoin, within the three weeks; but had not obtained and served an order for a commission to examine witnesses, in consequence of which the defendant moved to dismiss the Bill with costs, the Master of the Rolls, (Lord Langdale,) refused the motion with costs, observing, that, after the subpœna to rejoin, the plaintiff not requiring a commission to examine witnesses, the defendant might himself proceed with the cause (*i*).

Where a plaintiff requiring a commission to examine witnesses, obtains and serves the order for the commission within the before-mentioned period of three weeks from the date of

(*g*) Tozer v. Tozer, 1 Cox. 288; Anon. 5 Sim. 497. Sed vide Skip v. Warner, 3 Atk. 558; Squirrell v. Squirrell, 3 Swanst. 250 (n.)

(*h*) Anon. 5 Sim. 498.

(*i*) Carden v. Manning, 1 Keen, 380.

After replication

the order to dismiss, he places himself within the operation of the 17th order of 1831, the effect of which will be presently noticed.

This brings us to the consideration of the practice with regard to the dismissal of a Bill after a replication has been filed by the plaintiff in the ordinary way.

Of moving to dismiss after replication.

Under the old practice of the Court, a plaintiff, after he had filed a replication in the ordinary course, was entitled to withdraw his replication and amend his Bill, on payment of 20*s*. costs. This he might obtain leave to do upon motion of course, without notice, at any time before publication had passed in the cause. This practice of withdrawing the replication and amending the Bill, was frequently resorted to for the mere purpose of delaying the dismissal of the suit; but its effects were effectually corrected by the 15th of Lord Lyndhurst's Orders (*k*), by which motions for leave to withdraw replications and to amend, have been converted into special motions to be made upon notice, and supported by affidavit (*l*). Still, however, a plaintiff who was unwilling to proceed in the cause, had it in his power, very unnecessarily, to delay it by suing out a commission to examine witnesses in the country, the forms attendant upon which protracted the hearing much beyond the period which was necessary to enable a party using due diligence to bring his cause to a fit state to be discussed in Court. Having served a subpœna to rejoin, and, by that means, put it out of the defendant's power to move again to dismiss the Bill for want of prosecution, his next step was to obtain the commission to examine witnesses. He was, however, left very much to his own discretion as to the time for taking this step; for, although a defendant, if he found that after the cause was at issue, the plaintiff would not go on to commission, might, by order, have had a commission to examine his own witnesses; still the plaintiff might gain considerable time before the defendant would be disposed to move for the order; besides which, considerable delays were interposed and expenses occasioned by the practice and orders of the Court which prohibited the par-

(*k*) Ord. 1828. (*l*) Vide ante, v. 1, p. 540.

After replication.

ties from executing a commission in term, unless a special order was obtained to permit it, and which enabled the plaintiff to delay giving rules to produce witnesses and pass publication; the consequence of which was, a correspondent delay occurred in setting down the cause; the practice of the Court not permitting the setting down of a cause so that it should be heard in the same term in which publication passes, unless by consent or special order (*m*). To remedy these inconveniences, the 17th order of 1828 was framed, in pursuance of the recommendation of the Commissioners for inquiring into the practice of the Court: and, by that order, as amended in 1831, it is ordered, *that where a plaintiff files a replication, without having been served with a notice of motion to dismiss the Bill for want of prosecution, he shall serve a subpœna to rejoin, and, in case he requires a commission to examine witnesses, shall obtain and serve an order for such commission, within three weeks from the filing of the replication; and such commission shall, at the latest, be returnable on the first return of the second term next following; and the plaintiff shall give his rules to pass publication, at the latest, in the same term; and shall set his cause down for hearing and duly serve the subpœna to hear judgment, returnable in the succeeding term; and, if the plaintiff shall make default herein, then, upon application by the defendant, upon notice of motion, the plaintiff's Bill shall stand dismissed out of Court with costs, unless the Court shall make special order to the contrary* (*n*).

Where the replication has been filed, without notice to dismiss.

This order, (the language of which is certainly not very clear,) has occasioned much discussion as to whether it applies, generally, to all cases in which a plaintiff files a replication without having been served with a notice of motion to dismiss the Bill for want of prosecution, or whether it is applicable to those cases only in which a plaintiff requires a commission to examine witnesses. The discussion has, however, been set at rest by the decision of the Vice-Chancellor, (Sir L. Shadwell,) in *Williams* v. *Janaway* (*o*), in which his Honor has determined

(*m*) Beames's Orders. 318, 333, 335, 337. Cha. Rep. Expl. paper. 76.

(*n*) The order proceeds to give certain directions with regard to the course of proceeding when the plaintiff omits to obtain an order for a commission, or, on having obtained one, neglects to execute it, &c. As to which vide post.

(*o*) 6 Sim. 77.

After replication.

that the 17th order does not apply except in cases where a plaintiff wants a commission to examine witnesses, "inasmuch as the obligation to give rules to produce witnesses and to pass publication, and to set down the cause, is governed by the antecedent words, *and in case he requires a commission*'; the consequence is, that in cases where no commission is required, or order for one obtained and served by the plaintiff, the old practice remains unaltered. This decision has since received the sanction of Lord Cottenham, in *Crooke* v. *Trery* (*o*), and must, therefore, be considered as regulating the practice of the Court with regard to the dismissal of Bills after replication filed in the ordinary way.

—and plaintiff requires a commission.

According to this practice, therefore, a plaintiff who has replied to the answer voluntarily, must, if he requires a commission, serve a subpœna to rejoin within three weeks from the filing of his replication; he must also, within the same three weeks, obtain and serve an order for a commission to examine witnesses. But if the plaintiff does not require a commission, it is perfectly optional with him, nothwithstanding the 17th order, to serve a subpœna to rejoin or not; and his omission to do so within three weeks from the filing of the replication, will not entitle the defendant to move to dismiss the Bill against him under that order (*p*). If, however, the plaintiff does serve a subpœna to rejoin, he cannot, although he requires no commission to examine witnesses in the country, give rules to pass publication till the expiration of three weeks from the service of the subpœna to rejoin (*q*).

Secus where he does not.

After commission sued out.

Where the plaintiff serves a subpœna to rejoin and sues out a commission within three weeks from the filing of his replication, according to the direction of the 17th order, he must give his rules to produce witnesses and pass publication within the same term as that in which the commission is returnable; he must also set down his cause for hearing, and duly serve the subpœna to hear judgment, returnable in the succeeding term, otherwise the defendant may apply to the Court, by motion, upon notice, to have the Bill dismissed as against him

(*o*) 7 Sim. 161; Smith v. Oliver, 6 Law J., N. S. 328; 3 M. & Craig. 165, S. C.

(*p*) Smith v. Oliver, ubi supra.

(*q*) Flight v. Jones, 7 Sim. 256.

with costs, which the court will order, unless it sees cause to make a special order to the contrary.

After replication.

Where defendant is guilty of *laches;*

It is to be observed, that, in a recent case, where the plaintiff did not serve a subpœna to rejoin or sue out a commission, within three weeks from the time of filing his replication, but subsequently obtained an order for a commission, which was served on the following day, and *afterwards* served a subpœna to rejoin; upon a motion to dismiss the Bill, because the plaintiff had not given rules to pass publication and set the cause down, &c., according to the provisions of the 17th order, the Master of the Rolls, (Lord Langdale,) was of opinion, that the case was within the 17th order (r). His Lordship, however, refused the defendant his costs of the motion, upon the ground, (as it appears from the report,) that the defendant had neglected to apply to dismiss the Bill, upon the plaintiff's omitting to serve the subpœna to rejoin within three weeks from the filing of the replication. It is difficult, however, to reconcile this decision with that of the Lord Chancellor in *Smith* v. *Oliver* (s), above referred to, by which it has been decided, that a plaintiff not requiring a commission is not bound to serve a subpœna to rejoin; for it is to be recollected, that, at the expiration of three weeks from the filing of the replication, which is the time when the Master of the Rolls appears to have considered that the defendant ought, under the 17th order, to have moved to dismiss the Bill, he had nothing to indicate to him that the plaintiff intended to bring the act within the operation of the order, by requiring a commission. The only step which the plaintiff could take to shew that he required a commission, namely, the obtaining and serving the order, was not taken till long afterwards; and if the defendant had, before that time, moved to dismiss, because the subpœna to rejoin was not served within three weeks from the filing of the replication, his motion would probably have met the fate of that in *Smith* v. *Oliver* (s). There can be no doubt, however, that, if a defendant, after he is entitled to dismiss the Bill, because the plaintiff has not complied with the terms of the order, lies by, and allows the plaintiff to take a step in the cause of which he

—and allows plaintiff to proceed, he cannot dismiss.

(r) White v. Smith, 1 Keen. 3[illegible]1. (s) Ubi supra.

After replication.

(the defendant) had notice, he not only will not be entitled to an order to dismiss the Bill, but his motion for one will be dismissed with costs (*t*). A defendant who means to dismiss a Bill for want of due diligence on the part of the plaintiff, must himself be diligent in the exercise of the strict right.

Proceeding where plaintiff does not serve a subpœna to rejoin;

Where a plaintiff does not require a commission, he need not, as has been already stated, serve a subpœna to rejoin; and, in that case, the defendant must wait till three clear terms after the filing of the replication have expired, and then he may move, *upon notice*, to dismiss the plaintiff's Bill for want of prosecution, and the subsequent proceeding will then be the same as those pointed out as the practice of the Court, in cases where the plaintiff files a replication after service of a motion to dismiss for want of prosecution, but before such motion is made (*u*). The defendant, however, if no subpœna to rejoin is served by the plaintiff, may, at the expiration of the three terms, if he wishes to have the cause disposed of in a more conclusive manner than can be effected by a mere dismissal for want of prosecution, appear to rejoin *gratis*, and, by that means, force the cause on to a hearing (*x*). If he takes this course, however, or if the plaintiff serves a subpœna to rejoin (*y*), he will be precluded from afterwards moving to dismiss the Bill for want of prosecution, and he must adopt the course of proceeding pointed out in the anonymous case in Mr. Simon's reports before referred to (*z*).

—and defendant wishes to bring the cause to a hearing.

Effect of abandoning order for commission.

It may be observed here, that, where a plaintiff has once brought himself within the operation of the 17th general order, by obtaining and serving an order for a commission to examine witnesses, his subsequent abandonment of the order for the commission will not withdraw the case from the operation of the general order (*a*). It may also be remarked, that the 17th order of 1831 does not apply to cases in which the plaintiff requires a commission to examine witnesses abroad.

Commission abroad.

Costs.

It has been before stated, that, under the statute 4th Ann. c. 16, s. 23, upon the defendant's dismissing a Bill for want of

(*t*) Feres v. Hutchinson, 1 Russ. & M. 22.

(*u*) Ante, p. 376.

(*x*) For. Rom. 114.

(*y*) Ante, p. 376; Tozer v. Tozer, 1 Cox. 288, sed vide Skip v. Warner, 3 Atk. 558; Squirrell v. Squirrell, 3 Swanst. 250 (n).

(*z*) 5 Sim. 497, ante, p. 377.

(*a*) Rayson v. Lees, 1 Keen. 14.

prosecution, the plaintiff in such suit shall pay to the defendant or defendants his or their full costs, to be taxed by the Master (*b*). The rule laid down, by the above enactment, is followed in all cases of a Bill dismissed for want of prosecution, except those where the plaintiff has become a bankrupt (*c*), or has filed his Bill in *forma pauperis* (*d*), in which cases, as we have seen, the order for dismissal will be made without directing the plaintiff to pay the costs.

Consequences of.

Second suit suspended till costs of first have been paid.

It has been before stated, that an order to dismiss a Bill for want of prosecution cannot be pleaded in bar to a new Bill for the same matter (*e*); where, however, after a Bill has been so dismissed, the plaintiff files another Bill for the same purpose, the Court will suspend the proceedings on such new Bill till the costs of the former suit have been paid; and where the defendant in the suit which had been dismissed, died before he had received his costs, and the plaintiff filed a new Bill against his executor for the same object, the Vice-Chancellor ordered the proceedings on the new Bill to be stayed until the plaintiff had paid the executor the costs of the dismissed suit (*f*).

Even where the defendant in the second suit is executor of the defendant in the original.

No proceeding after order to dismiss.

An order to dismiss a Bill for want of prosecution, effectually puts an end to every proceeding in the suit which has been dismissed, and no subsequent step can be taken in it, except such as may be necessary for carrying into effect the order of dismissal. Therefore, where a defendant obtained an order to dismiss a Bill for want of prosecution, without having made a motion of which he had given notice, it was held, that the defendant could not afterwards obtain the costs of the motion, as an abandoned motion.

Costs of an abandoned motion cannot be recovered.

Bill dismissed for want of prosecution may be restored.

But although a Bill which has been dismissed for want of prosecution, is so effectually out of Court, that no motion or proceeding can be had in the cause, except for the purpose of carrying the order of dismissal into effect; it seems that the Court will, under special circumstances, entertain a motion to restore it (*g*). It is not, however, the ordinary course of the

(*b*) Ante, p. 253.
(*c*) Ante, p. 362.
(*d*) Ante, p. 354.
(*e*) Ante, p. 175.
(*f*) Spires v. Sewell, 5 Sim. 193.
(*g*) Jackson v. Purnell, 16 Ves. 204; Fon. Rom. 112.

Consequences of.

Court to restore a Bill which has once been dismissed. It must be shewn that substantial justice requires that it should be done, and then, upon the particular circumstances, the Court will make the order (*h*). And there is no instance to be found, in which the Court has restored a Bill which has been regularly dismissed, for the mere purpose of agitating the question of costs (*i*). The method by which the restoration of a cause after a dismissal for want of prosecution, is to be effected, appears to be by obtaining an order to discharge the order dismissing the Bill, which can be procured only upon the terms of the plaintiff's paying the costs of obtaining that order, and of the application for the order to discharge it. In *Jackson* v. *Purnell* (*k*), the order appears to have been made upon the plaintiff's undertaking to amend, within a week, amending the office copy, and not requiring any further answer, and to reply forthwith, and speed his cause to a hearing, &c. (*l*).

But not for the purpose of agitating the question of costs.

Form of application.

May be made after notice to discharge order to dismiss for irregularity refused.

It is to be noticed, that an order of this description is quite distinct from one to discharge an order to dismiss *for irregularity*, and that the circumstance of an order of that description having been applied for, and refused, will not prevent the plaintiff from moving to have his Bill restored upon special circumstances, in the manner above stated (*m*).

Where the plaintiff has become bankrupt.

Besides the ordinary occasions for the defendant's application to dismiss the plaintiff's Bill, viz., for want of prosecution, there are other occasions, upon which the defendant may make a motion to the same effect, as where a sole plaintiff becomes a bankrupt; in which case, as we have seen, the defendant may apply to have the Bill dismissed, unless the assignees will file a supplemental Bill against him, within a limited time; or in cases of election, where a plaintiff has been ordered to elect whether he will proceed against the defendant at law or in equity,

In cases of election.

(*h*) Hannam v. South London Water Works Company, 2 Mer. 63.

(*i*) Ibid.

(*k*) 16 Ves. 204.

(*l*) Vide 3 V. & B. 1, n., S. C.

(*m*) Hannam v. South London Water Works Company, ubi supra.

and elects to proceed at law; the course of proceeding upon which, will be hereafter noticed.

In cases of election.

Another ground which a defendant may have for applying to dismiss the Bill, is where the plaintiff after filing it, enters upon the land in question, or does any thing of that nature, without the leave of the Court, in which case the defendant may move to have the Bill dismissed, at least so far as relates to that matter, because the plaintiff has, by his own act, taken upon himself to be the judge in his own case, and renounced the judgment of the Court (*p*). If the Bill relates to any other matter, the plaintiff will be at liberty to proceed for so much (*q*).

—or where plaintiff enters upon the land &c. without leave of the Court.

A defendant may also apply to the Court to dismiss a Bill with costs, in a case in which the Bill has, upon the hearing, been retained, for a certain period, with liberty for the plaintiff to bring an action at law against the defendant, and to try the same within that time, but the plaintiff does not avail himself of that liberty. The most effectual course, however, for a defendant to adopt under such circumstances, is to set the cause down again for hearing upon further directions, and to get it dismissed with costs, which it seems he may do, although no further directions are reserved in the order retaining the Bill (*r*).

Where the Bill has been retained in Court with liberty to bring an action &c.

(*p*) Prac. Reg. 180. Vide etiam Grafton v. Griffin, 1 R. & M. 336.

(*q*) Prac. Reg. 180.

(*r*) Stevens v. Praed, 2 Cox, 374.

CHAP. XVIII.

OF REPLICATION.

In what cases proper.

After the defendant has fully answered the Bill, and the plaintiff is determined to proceed in the suit, he must consider whether sufficient is admitted by the answer to enable him to go to a hearing of the cause as it stands upon the Bill and answer.

If, upon the answer alone, without further proof, there be a sufficient ground for a final order or decree, the plaintiff should proceed to a hearing without replying or examining witnesses; as if the plaintiff makes his title by a will or other conveyance in the defendant's hands, and the defendant, by his answer, confesses it (*a*). So where a trust is confessed by the answer, there needs nothing further but a reference to a Master to take the accounts, &c. (*b*).

It is very important to the plaintiff, in deciding whether to set down the cause upon Bill and answer against a particular defendant, or to reply to his answer, to bear in mind, that, in a hearing upon Bill and answer, the answer will be taken to be true in every point (*c*), because the defendant has been precluded from substantiating it by evidence. It therefore behoves the plaintiff to look attentively into the answer, and see that the effect of the defendant's admissions is not avoided by any new matter there introduced (*d*). If such should be the case, he should reply to the answer, and proceed to establish his case by proofs. And sometimes, though he should happen to need no witness on his part, yet it may be necessary to reply, for the purpose of putting the defendant to prove the allegations in his answer; as where he confesses the matter

(*a*) Prac. Reg. 374.
(*b*) Ibid.
(*c*) Ibid. Toth: 55.
(*d*) Coop. Eq. Pl. 329.

alleged by the plaintiff, but sets forth some further matter in bar of the plaintiff's equity (*e*).

In what cases proper.

If the plaintiff decides upon having the cause heard upon Bill and answer against one or all of the defendants, he must proceed in the manner which will be pointed out in the chapter upon "Hearing." If he is of opinion that the answer of the defendant, or of some of the defendants, will not authorize his taking that step, he must file a replication.

After plea.

A replication may also be put in by the plaintiff where the defendant has pleaded to the Bill, whether his plea be accompanied by an answer or not. It is, however, to be recollected, that, if the plaintiff replies to a plea before it has been argued, he admits the plea to be valid, if true; and that he cannot afterwards object to it on the ground of its invalidity or irregularity (*f*).

After disclaimer.

We have seen, before, that a replication to a general disclaimer to the whole Bill is improper, although, when a disclaimer to part of the Bill is accompanied by a plea or answer to another part, there may be a replication to such plea or answer (*g*).

Nature of replication.

Special.

A replication is the plaintiff's answer or reply to the defendant's plea or answer. Formerly, if the defendant, by his plea or answer, offered new matter, the plaintiff replied specially to the new matter (*h*); otherwise the replication was merely a general denial of the truth of the plea or answer, and of the sufficiency of the matter, alleged in it, to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the Bill (*i*). The consequence of a special replication was a *rejoinder*, by which the defendant asserted the truth and sufficiency of his answer, and traversed every material part of the replication (*k*). If the parties were not then at issue, by reason of some new matter disclosed in the rejoinder which required an answer, the plaintiff might *sur-rejoin* to the rejoinder; and the defendant might, in like manner, *ad-sur-rejoin* or *rebut* to the sur-rejoinder (*l*).

(*e*) Prac. Reg. 375.
(*f*) Ante, p. 220.
(*g*) Ante, p. 235.
(*h*) Lord Red. 259.
(*i*) Ibid.
(*k*) 2 West. Symbol. Chan. 195 (a), 232 (b), 246 (b).
(*l*) Ibid. 195 (a); Prac. Reg. 372; Lord Red. 260.

General.

The inconvenience, delay, and unnecessary length of pleading, arising from these various allegations on each side, occasioned an alteration in the practice. Special replications, with all their consequences, are now out of use, and the plaintiff is to be relieved according to the form of the Bill, whatever new matter may have been introduced by the defendant's plea or answer (*m*). But if the plaintiff conceives, from any matter offered by the defendant's plea or answer, that his Bill is not properly adapted to his case, he may, as we have seen, obtain leave to amend his Bill, and suit it to his case, as he shall be advised (*n*).

Form of.

A replication is intitled in the same manner, ***mutatis mutandis***, as an answer, and commences with a general saving of the advantage of exception to the manifold insufficiencies of the answer, which is followed, when it is a general replication, by an averment and offer to prove that the matters in the Bill are true, certain, and sufficient in law to be answered unto, and that the answer of the defendant is uncertain, untrue, and insufficient to be answered unto. It then concludes with a general traverse of all the matters contained in the answer (*o*).

A special replication is nearly in the same form, except that it points out the parts of the answer which it admits to be true, and traverses the rest (*p*).

Signature of Counsel.

The signature of Counsel is required to a replication, only when it is special, and not when it is general (*q*).

It must be written upon parchment; and the Clerk in Court, instructed by his client, files it of course, the day of the month and year when it is filed being previously inscribed thereon, with the sirname of the plaintiff's Six Clerk, and Clerk in Court who files it, subscribed at the foot on the left side, and also the term in which the Bill was filed, and the sirname of the defendant's Six Clerk (*r*).

Within what time.

A replication may be filed immediately after the answer has come in. Regularly, it should be filed before the period which

(*m*) Lord Red. 260; Prac. Reg. 372.

(*n*) Ante, chap. VI. sec 8, vol. 1, p. 508.

(*o*) Hind. 285.

(*p*) Ibid. 286.

(*q*) Hind. 287.

(*r*) Hind. 285.

has been mentioned as given to the plaintiff by the 16th Order of 1831, to consider what future proceedings in the cause shall be had; but, as we have seen, a replication will be in time to prevent an order to dismiss the Bill for want of prosecution, if filed after notice of the motion to dismiss has been served, but before the order is made (*s*).

Within what time.

Where a plaintiff has amended his Bill after answer, and has not served a *subpœna* to answer the amended Bill, he must wait till the expiration of eight days allowed to the defendant by the 14th Order of 1833, to consider whether it is necessary for him to answer the amended Bill (*t*), before he can file his replication, unless the amendment consists merely of an alteration of names, dates, or sums, or the correction of clerical errors; in which case he may file his replication immediately. The eight days are to be calculated from the date of the entry of the amendment in the cause-book at the Six Clerks' Office, which, by a recent order, (12th May, 1838,) is directed to be made upon the amendment of every Bill being completed, and from which date the amended Bill is to be deemed to have been filed. If the defendant serves an order for time to answer or a warrant to attend the Master upon an application for such time, the replication must not be filed till the usual time after the answer has been put in.

After amendment of Bill.

We have seen before, that, after a replication has been filed, a plaintiff, if he wishes to withdraw it and amend his Bill further than by adding parties, must make a special application for leave to do so to one of the Masters of the Court (*u*), in which case, he must satisfy the Master, by affidavit, that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into the Bill (*x*).

Of withdrawing replication, —for the purpose of amending.

A plaintiff may also obtain leave, upon motion, to withdraw his replication, and set his cause down for hearing upon Bill and answer (*y*); and that, even after he has entered into an undertaking to speed the cause. In such case, the undertaking

—or of setting down cause on Bill and answer.

(*s*) Ante, p. 365.

(*t*) Savory v. Dyer, Amb. 70. Vide etiam Bolton v. Bolton, ante, v. 1, p. 519.

(*u*) Ante, v. 1, 546.

(*x*) Ibid. Ord. 1828. XV.

(*y*) Rogers v. Goore, 17 Ves. 130.

Within what time.

to set the cause down for hearing upon Bill and answer, has, as we have seen, been held to include the service of a subpœna to hear judgment, although not so expressed in the order (*z*).

After examination of witnesses.

It may be observed here, that it has sometimes happened, that, even after witnesses have been examined, it has been discovered, that, owing to a mistake, no replication has been filed; in such cases the Court has permitted the replication to be filed *nunc pro tunc* (*a*). And it seems that the Court has permitted this to be done after the cause has come on for hearing, and the reading of the proofs has been commenced (*b*).

(*z*) Ibid. Ante, p. 375.
(*a*) Prac. Reg. 397.
(*b*) Rodney v. Hare, Mos. 296.

CHAP. XIX.

OF REJOINDER.

Subpœna to rejoin.

After the plaintiff has filed his replication, he should serve the defendant with a *subpœna to rejoin.*

Under the old practice.

According to the ancient practice of the Court, when the plaintiff filed his replication in term, he might sue out a subpœna, against the defendant, to rejoin, returnable at a certain day in term, which *subpœna* required personal service (*a*). This practice, however, was very rarely resorted to, unless when the defendant lived in town, and could easily be served; and the most usual way was to apply to the Court, by motion or petition, that a *subpœna* to rejoin, returnable *immediately*, might issue against the defendant, and that service thereof on the defendant's Clerk in Court might be good service, which was granted of course (*b*).

Under the New Orders.

The necessity of having an order of the Court to authorize the service of a *subpœna* to rejoin upon the defendant's Clerk in Court was, however, taken away by the 20th of Lord Lyndhurst's Orders (*c*), which directed, that "service on the Clerk in Court of any subpœna to rejoin, or to answer an amended Bill, should be decreed good service;" and, by the orders of 1833, by which the forms of all subpœnas at present in use have been prescribed, a *subpœna to rejoin* is in all cases returnable *immediately;* so that a subpœna to rejoin, returnable immediately, to be served on the defendant's Clerk in Court, may in all cases be sued out without order.

The method of preparing and serving a subpœna to rejoin is the same as that of preparing and serving a subpœna to appear and answer (*d*). The form of the subpœna is as follows:—

(*a*) 1 Harr. 242. ed. Newl.
(*b*) Ibid.
(*c*) Ord. 1828.
(*d*) Ord. 1833, I. Vide ante, chap. VII.

Subpœna to rejoin.

'*Victoria, &c. To ——, greeting. We command you [and every of you] that, immediately after the service of this writ, you do appear in our High Court of Chancery, then and there to rejoin and join in commission, if thereunto required, in a certain cause wherein* —— [and others or another] *are plaintiffs, and* —— [and others or another] *are defendants. Witness, &c.*'

The names of three defendants (husband and wife being reckoned as one,) may be inserted in the same subpœna to rejoin; but if three are inserted, and one or two only are served, if the plaintiff proceed to examine witnesses, the party not served shall not be concluded by those examinations, being no party thereto.

Within what time to be served.

No particular time is limited by the practice of the Court within which a plaintiff is bound to serve a subpœna to rejoin, unless where he requires a commission to examine witnesses, in which case he must, in order to entitle himself to such commission, serve his subpœna to rejoin, as well as an order for such commission, within three weeks from the filing of his replication (*e*).

If, however, a plaintiff, after filing his replication, omits to serve his subpœna to rejoin within three terms, the defendant may either apply to the Court, by motion, to dismiss the Bill for want of prosecution, or he may appear to rejoin *gratis*, and thereby put the cause in a course for hearing (*f*).

Rejoinder seldom actually filed.

After the defendant or his Clerk in Court has been served with a subpœna to rejoin, he ought, in strictness, to appear, and file a rejoinder to the plaintiff's replication: in practice, however, a rejoinder is seldom or never filed, the cause being considered as completely at issue between the parties immediately after the service of the subpœna to rejoin, or the defendant's appearance to rejoin *gratis;* so that it is competent to either party to proceed to the examination of his witnesses (*g*).

(*e*) Ord. 1831, XVII. Ante, p. 380. This rule applies, as we have seen, as well to cases in which the plaintiff has filed his replication in pursuance of an undertaking to speed the cause, as to those in which he has replied without having entered into such undertaking. Vide ante, p. 376.

(*f*) Prac. Reg. 371. For. Rom. 114.

(*g*) Prac. Reg. 371.

De novo.

In what cases.

It is to be observed here, that, by the Bankrupt Act, 6 Geo. 4, c. 16, s. 91, it is enacted, that, in all suits in equity by or against the assignees of a bankrupt, no proof shall be required, at the hearing, of the petitioning creditor's debt or debts, or of the trading or act or acts of bankruptcy respectively, as against any of the parties in such suit, except such parties as shall, within ten days *after rejoinder*, give notice in writing to the assignees of his or their intention to dispute some and which of such matters. Where, therefore, a party to a suit intends to dispute any of the matters mentioned in the above section (*h*), he ought, in strictness, to give notice in writing of his intention so to do, to the assignees, within ten days after the rejoinder. If, however, the defendant omits to give the notice within the time required by the act, the Court will permit him to withdraw his rejoinder and rejoin *de novo* (*i*); and it has even gone to the extent of permitting this to be done after the cause was at issue, and witnesses had been examined, upon the defendant's Solicitor making an affidavit that the notice was omitted through inadvertency, and that it was essential to justice that such permission should be granted (*k*). It is to be observed, however, that the Court's making such an order is an act of indulgence, and ought not to be extended to a case where the negligence of the party obtaining it has put it out of the power of the other party to establish the fact which it is intended to dispute; and accordingly, in the latter case, the Court modified the order, so that the defendant should only be entitled to the benefit of it upon his consenting that the depositions of a person deceased, which were made in the bankruptcy, should be admitted as evidence of the act of bankruptcy (*l*).

It does not appear, from the above cases, whether any rejoinder had been filed: it is suggested, however, that it is one of the cases in which a rejoinder should be actually filed, other-

(*h*) As to the cases in which those matters may now be disputed, vide ante, v. 1, p. 88.

(*i*) Berks v. Wigan, 1 V. & B. 221.

(*k*) Brickwood v. Miller, Coop. 270

(*l*) Brickwood v. Miller, 1 Mer. 4, S. C.; 2 Rose, 216, S. C.

In what cases filed.

wise there is no period from which the ten days mentioned in the Act can be correctly computed.

It also seems to be necessary actually to file a rejoinder where a plaintiff in a cause has examined a witness *de bene esse*, and afterwards replied, without serving a subpœna to rejoin, in order to force the plaintiff to examine his witness again in chief; the effect of the rejoinder in such case being, to render the depositions taken *de bene esse* nugatory, if the witness lives long enough to be examined in chief (*m*).

Proceeding where no replication filed.

By an order of the Court, no *subpœna to rejoin* shall be of force, unless there be a replication filed in the cause, according to the course of the Court, before the issuing out of the said *subpœna*, or at least before the return thereof; and the parties upon whom such *subpœna* shall be served, finding no replication filed before the return thereof, shall have the ordinary costs taxed according to the course of the Court (*n*).

We have seen, however, before, that where, through mistake or inadvertence, the plaintiff has omitted to file a replication, he may obtain leave to do so *nunc pro tunc* (*o*).

After rejoinder, or service of a *subpœna* to rejoin, a defendant cannot move to dismiss for want of prosecution, but must proceed in the manner already pointed out (*p*).

(*m*) Hind. 291.
(*n*) Beames's Ord. 109, 183.
(*o*) Ante, p. 390.
(*p*) Ante, p. 376.

CHAP. XX.

OF EVIDENCE.

PART I.—OF THE MATTERS TO BE PROVED.

SECT. I.—*Of Admissions.*

THE cause being at issue, by the service of the subpœna to rejoin, or by the defendant's appearance to rejoin *gratis*, the next step to be taken by the plaintiff is, to prepare his proofs. The defendant, also, if he has any case to establish in opposition to that made by the plaintiff, must, in like manner, prepare to substantiate it by evidence.

Of the general nature of admissions.

In order to this, the first consideration with both parties must be the question, what is necessary to be proved? and, having decided upon that, they must then ascertain the manner in which the proof is to be effected. In the following chapter, therefore, a few pages will be devoted to a brief consideration of the matters necessary to be proved, both on the part of the plaintiff and of the defendant.

With respect to this point, it may be laid down as an indisputable proposition, that whatever is necessary to support the case of the plaintiff, so as to entitle him to a decree against the defendant; or, in the case of a defendant, to support his own case, as made by his answer, against that of the plaintiff; must be proved, unless it is admitted by the other party.

Our object at present, therefore, must be to consider what admissions by the parties will preclude the necessity of proofs.

Upon the record.

Admissions are either, I. Upon the Record; or, II. By Agreement between the Parties.

Division of. Admissions on the record.

I. Admissions on the Record may be, 1, *constructive, i. e.* those which are the necessary consequence of the form of pleading adopted; or, 2, *actual, i. e.* those which are positively contained in the pleading.

Constructive admissions.

1. With respect to *constructive* admissions, the most ordinary instance of them is, where a plea has been put in by a defendant either to the whole or part of the Bill; in that case, as we have seen, the Bill, or that part of it which is pleaded to, so far as it is not controverted by the plea, is admitted to be true.

In the case of pleas.

A plaintiff, therefore, where he has replied to a plea, may rest satisfied with that admission, and need not go into evidence as to that part of his case which the plea is intended to cover (*a*), unless the plea is a negative plea, in which case it will be necessary for him to prove the matter negatived, for the purpose of disproving the plea, in the same manner that he may enter into evidence for the purpose of disproving matter which has been pleaded affirmatively (*b*).

The same rule is applicable where a special replication is put in to an answer: in such case, all those parts of the answer which are not denied by the replication are admitted to be true.

By the Bill.

The facts alleged in a Bill, where they are alleged positively, and not by way of pretence, are also constructive admissions, in favour of the defendant, of the facts so alleged, and, therefore, need not be proved by other evidence; for, whether they be true or not, the plaintiff, by introducing them into his Bill, and making them part of the record, precludes himself from afterwards disputing their truth. Sometimes facts are hypothetically introduced into a Bill, for the purpose of raising an answer to an anticipated defence, with a species of protest against their being considered as admitted; as, '*Whereas your orator charges, that, in case such or such a thing be true, but which your orator by no means admits;*' in such cases, the

(*a*) The plaintiff may, however, as we have seen, examine at large into his whole case. Ante, p. 224.

(*b*) Ante, p. 223.

matter alleged is not, of course, to be considered as admitted by the Bill, but must be the subject of proof.

Upon the record.

It is to be observed, that there is a great difference between actual and constructive admissions, with respect to the manner in which they are presented to the Court: the former are read to the Court to substantiate the case of the party reading them, in the same manner as the other proofs in the cause; the latter are presented to the Court, at the outset of the hearing, by the Counsel opening the pleadings, for the purpose of shewing what the matters in issue, between the parties, are.

Difference between constructive and actual admissions.

2. *Actual* admissions on the record are those which appear either in the Bill or in the answer.

Actual admissions

The plaintiff, of course, cannot read any part of his own Bill as evidence in support of his case, unless where it is corroborated by the answer; as where the Bill states a deed or a will, and the defendant, in his answer, admits the deed or will to have been properly executed, and to be to the tenor and effect set forth in the Bill; in such case, the plaintiff, having read the admission from the answer, may read his Bill, to shew the extent of the admission made by the defendant. In strictness, however, this can hardly be called reading the Bill on the part of the plaintiff, since the reading is only allowed because the defendant, by admitting the statement to be true as set forth in the Bill, has, to that extent, made that portion of the Bill a part of his answer. It is to be observed, that, in *Cox* v. *Allingham* (c), the Master of the Rolls, (Sir Thomas Plumer,) said, 'it must be a very explicit and unqualified admission to dispense with the production of that which constitutes the foundation of the suit: nothing short of that would do, even if that would do.'

—in the Bill. Plaintiff cannot read his own Bill; —unless to shew the effect of a document admitted by answer.

Where a defendant refers to the document *for greater certainty*, &c., he has a right to insist upon the document itself being read (*d*). It is, however, to be noticed, that, in a case before the Court of Exchequer, the plaintiff was permitted to read from his Bill a will that had been admitted by the answer, although the defendant had, in his answer, referred to the will for certainty, &c.; but no

Effect of reference to document itself, 'for greater certainty.'

(c) Jac. 339.

(*d*) Cox v. Allingham, Jac. 337.

Upon the record.

question in the cause turned upon the construction of the will (e).

Proof of documents referred to.

Where a defendant, by his answer, admits a document set out in the Bill to be to the purport or effect set out, &c., but craves leave to refer to it, the plaintiff need not, on that ground, reply to the answer, but may set the cause down for hearing on Bill and answer, and obtain an order to prove the document *viva voce* at the hearing (*f*), provided it be such a document as, by the rules of the Court hereafter to be noticed, can be read in that manner (*g*).

Bill taken *pro confesso* under the statute.

We have seen before, that, in certain cases, (viz.) where a Bill has been taken *pro confesso* under the Stat. 1 W. 4, c. 36, it may be read in evidence against the defendant, against whom it has been so taken *pro confesso* (*h*). In addition to what has been already stated upon this point, it is to be noticed, that, in *Cory* v. *Gerteken* (*i*), Sir Thomas Plumer, (V.C.) permitted a cross Bill for a discovery which had been taken *pro confesso* against the plaintiff in the original suit, to be read at the hearing of the cause, although it did not appear to have been taken *pro confesso* under the statute then in force upon that subject (*k*); but it is to be remarked, that, in allowing it, his Honour acted in obedience to an order which the defendant had previously obtained, directing the Bill to be taken *pro confesso*, and to be read at the hearing, 'saving just exceptions,' and which, as it had not been discharged, he considered imperative upon him.

Query, as to Bill taken *pro confesso*, not under the statute.

Defendant may read plaintiff's Bill as an admission of facts.

With respect to the right of a defendant to make use of the plaintiff's Bill as an admission of the facts therein stated, it is to be observed, that, at common law, the general rule is, that a Bill in Chancery will not be evidence, except to shew that such a Bill did exist, and that certain facts were in issue between the parties, in order to introduce the answer or the depositions of witnesses, and that it cannot be admitted as evidence to prove any facts either alleged or denied in the

Secus at law.

(*e*) Owen v. Jones, 2 Anst. 505.
(*f*) Fielder v. Cage, Prac. Reg. 219.
(*g*) Vide post.
(*h*) Ante, v. 1, p. 124.
(*i*) 2 Mad. 43.
(*k*) 45 Geo 3, c. 124, s. 5.

Bill (*l*). In Courts of Equity however, a different rule prevails, and the Bill may be read as evidence, for the defendant, of any of the matters therein averred (*m*).

Upon the record.

Where the Bill has been amended.

Amended Bill only read,

But although a defendant has a right to read the plaintiff's Bill as evidence against him, such right is confined to the Bill as it stands on the record. If the Bill has been amended, the amended Bill is the only one upon the record, and the defendant has no right in that case to read the original Bill in evidence (*n*). It seems, however, that where the consequence of the amendment has been to alter the effect of the answer to the original Bill, or to render it obscure, the defendant has a right to read the original Bill for the purpose of explaining the answer (*o*). And in a cause in the Court of Chancery in Ireland, Sir Anthony Hart, (L. C.) in deciding upon the question of costs, read from the defendant's office-copy certain charges in the original Bill which had been expunged by amendment, for the purpose of ascertaining, *quo animo*, the Bill had been filed (*p*).

—unless to explain answer,

—or upon the question of costs.

A Bill may also be read in evidence against a plaintiff, although filed by him in another suit. In such case, however, it will be necessary to prove that it was exhibited by the direction, or with the privity, of the party plaintiff in it, 'for any person may file a Bill in another person's name' (*q*).

In *Hales* v. *Pomfret*, before referred to (*r*), the Bill offered in evidence was for tithes, and had been filed by a former rector. In general, however, the rule appears to be, not to permit Bills in another cause to be read as legal evidence, unless by way of corroborating other evidence (*s*).

Answer.

With respect to admissions made by the answer of a defendant, it is to be observed, that although a plaintiff by his replication denies the truth of the whole of the defendant's answer, he does not thereby preclude himself from reading

(*l*) 1 Phillips on Evid. 359.
(*m*) Ives v. Medcalfe, 1 Atk. 63.
(*n*) Hales v. Pomfret, Dan. Ex. Rep. 141.
(*o*) Ibid.
(*p*) Fitzgerald v. O'Flaherty, 1 Molloy, 347.
(*q*) Woollet v. Roberts, 1 Ch. Ca. 64.
(*r*) Ubi supra.
(*s*) Handeside v. Brown, 1 Dick. 236.

Upon the record.

whatever portion of it he thinks will support his case; except the answer be that of an infant, which, as we have seen, can never be read to establish a fact which it is against the infant's interest to admit (*t*). It may be observed, however, that although the answer of an infant cannot be read against him, the answer of the person under whom he derives title, may, and therefore it has been held, that if, in a suit to establish a will against the heir, the heir puts in his answer admitting the will, and dies before the hearing, the derivative heir, though an infant, will be bound by the admission, and that the will need not be proved (*tt*). Of course, if an infant heir is bound by the admission of his ancestor, such an admission will be equally binding upon an adult.

Practice as to reading defendant's answer.

In permitting an answer to a Bill praying relief, to be partially read by a plaintiff in support of his case, the practice of Courts of Equity differs materially from that of Courts of Law, in which, if the answer of a defendant is offered as evidence against him, the defendant has a right to insist upon the whole being read, in order that, by comparing the several parts with each other, the true meaning and extent of the admissions may be more clearly understood (*u*). It must not, however, be supposed that, in permitting a plaintiff to read a portion only of the defendant's answer in support of his case, a Court of Equity will allow a plaintiff to read a passage from a defendant's answer, for the purpose of fixing a defendant with an admission, without reading the explanations and qualifications by which the admission may be accompanied, even though such explanations and qualifications be contained in a distinct passage from that offered to be read. The rule is, "that where a plaintiff chooses to read a passage from a defendant's answer, he reads all the circumstances stated in the passage. If the passage so read, contains a reference to any other passage, that other passage must be read also" (*x*). Thus where, in the course of hearing a cause, the plaintiff's counsel

(*t*) Ante, v. 1, p. 236.

(*tt*) Robinson v. Cooper, 4 Sim. 131; Loch v. Foot, ibid. 132; ante, vol. 1. p. 239.

(*u*) Phillips & Amos on Evid. 357.

(*x*) Bartlett v Gillard, 3 Russ. 157; vide etiam Lord Ormond v. Hutchinson, 13 Ves 47, 53; 16 Ves. 94, S. C.

Upon the record.

read a passage from the answer which commenced with the following words, '*Before such demand was made,*' *&c.*; and the defendant insisted that the passage immediately preceding, in which the demand was spoken of, and which contained statements of several other circumstances, which in grammatical construction were connected with the mention made of the demand, should be read, which the Court ordered, and upon that occasion, laid down the rule as above stated (*y*). The same rule has since been recognised, and acted upon in several cases (*z*). But it is to be observed, that although a defendant has a right to insist that, where a plaintiff reads a passage from his answer, he shall read other passages in the answer which are connected in meaning with the first passage, whether such passages are connected in point of grammatical construction, or separated by passages relating to distinct subjects (*a*), the Court will not, where 'a plaintiff reads a passage in a defendant's answer, as evidence of a particular fact, allow a defendant to read, as evidence, any subsequent matter, although it may be connected with the passage, which the plaintiff had read, by such words as 'but' or 'and', unless the subsequent matter is explanatory of the passage read by the plaintiff (*b*).' It is also to be remarked, that even where a passage is allowed to be read as explanatory of a part previously read by the plaintiff, it is to be read only for the purpose of explanation so far as explanation may be necessary. If in the passage so read, new facts and circumstances are introduced, in grammatical connexion with that which must be read for the purpose of explaining the reference, the facts and circumstances so introduced are not to be considered as read (*c*).

To this may be added, that where a plaintiff, in reading a passage from a defendant's answer, has been obliged to read an allegation which makes against his case, he will be permitted to read evidence to disprove such allegation (*d*).

(*y*) Bartlett v. Gillard, 3 Russ. 156.

(*z*) Vide Rude v. Whitchurch, 3 Sim. 562; Nurse v. Bunn, 5 Sim. 225.

(*a*) Ibid.

(*b*) Davis v. Spurling, 1 R. & M. 64, 68.

(*c*) Bartlett v. Gillard, ubi supra.

(*d*) Price v. Lytton, 3 Russ. 206.

Upon the record. When the answer is to a Bill of discovery, the whole must be read.

It is to be observed, in this place, that although Courts of Equity permit the answer of a defendant to be partially read, such permission is confined to answers to Bills praying relief; where an answer to a Bill of discovery only is used as evidence, the whole must be read, as at law (*e*).

What will be an admission of a fact by answer

With respect to what will be considered as such an admission by an answer, as will dispense with the necessity of other proof, it may be stated, that besides those expressions which in words admit the fact alleged to be true, a statement by the defendant that '*he believes,*' or that he has been '*informed and believes,*' that such fact is true, &c., will be sufficient, unless such statement is coupled by some clause to prevent its being considered as an admission. The rule in equity being, that *what the defendant believes the Court will believe* (*f*).

—belief,

—but not information without *belief,*

A mere statement, however, in an answer, that a defendant has been informed that a fact is as stated, without an answer as to his belief concerning it, will not be such an admission as can be read as evidence of the fact. Such an answer is, in effect, insufficient, and if the plaintiff, upon reading the pleadings, finds such a statement as to a fact, with respect to which it is important to have the defendant's belief, he should except to the answer for insufficiency. It is to be remarked, that although the Court will, in general, consider what the defendant '*believes*' to be true, as admitted by him, it will not treat the statement of an heir-at-law, that he believes a will to have been executed as an admission of the will, but will require either a direct admission or proof of its execution, in the usual way (*g*).

—or belief as to the due execution of a will.

Infant's answer.

It has been before stated, that the answer of an infant being in fact the answer of his guardian, cannot be read against him (*h*). The answer, however, may, it seems, be read against the guardian; and in *Beasley* v. *Magrath* (*i*) the answer of an infant by his mother and guardian in another cause, was read against the mother in her own capacity. And it seems, that where a defendant, being an infant, answers by guardian, and

May be read against guardian.

(*e*) Lord Ormond v. Hutchinson, 13 Ves. 47; 16 Ves. 94, S. C.

(*f*) Potter v. Potter, 1 Ves. 274. sed vide, and query; Hill v. Binney, 6 Ves. 738.

(*g*) Potter v. Potter. 1 Ves. 274.

(*h*) Ante, v. 1, p. 236.

(*i*) 2 Sch. & Lef. 34.

at full age neither amends nor makes a new answer, as he may do, but prays a hearing of the cause *de novo*, his answer shall be evidence against him (*k*).

Upon the record.

But although the answer of an infant cannot be read against him, the rule is different with respect to the answer of a person of weak intellect, taken by guardian (*l*). The answer of an idiot or lunatic, put in by his committee, may also be read against him.

Answer of an idiot or lunatic; —person of weak intellect;

For the rules of practice, with regard to reading the answer of married persons, the reader is referred to a former portion of this treatise (*m*).

—of baron and feme.

It may be stated, as a general and almost universal rule, that the answer of one defendant cannot be read for the purpose of affording evidence against another (*n*); because there is no issue between the parties, and no opportunity for cross-examination (*o*).

In what cases, the answer of one defendant may be read against another.

In *Morse* v. *Royal* (*p*), the answer of an executor was offered as evidence against the residuary legatee, who had been made a party to the suit; but Lord Erskine refused to receive it for any other purpose than that of shewing what funds came to the hands of the executors, what debts there were, the value of the estate, &c.

Cases, however, have sometimes occurred, in which a defendant has, by the form of his answer, made the answer of a co-defendant evidence against himself; as where a defendant stated in his answer, that he was much in years, and could not remember the matter charged in the Bill, but that J. S. was his attorney and transacted the matter, whereupon J. S. was made a defendant; the answer was allowed to be read against the original defendant; Lord Cowper being of opinion, that the words in the first answer amounted to a reference to the co-defendant's answer (*q*). From that case, therefore, it may be collected, that whenever a defendant refers to the answer of a

Where defendant refers to answer of co-defendant.

(*k*) Hind. 422.
(*l*) Ante, v. 1, p. 249.
(*m*) Ante, v. 1, p. 214.
(*n*) Jones v. Turberville, 2 Ves. Jr. 11; 4 Bro. C. C. 115. S. C.
(*o*) Chervat v. Jones, Mad. & G. 268. The case of answers to a Bill of interpleader, affords an exception to this rule; vide post, Interpleader.
(*p*) 12 Ves. 355.
(*q*) Anon. 1 P. Wms. 301.

Upon the record.

co-defendant, as giving information which the defendant himself is unable to give, the answer of that co-defendant may be read against the defendant referring to it.

Answer cannot be read by defendant himself,

—except on question of costs.

It is to be observed, that where an answer has been replied to generally, it can in no case be read as evidence on the part of the defendant himself. In disposing of the question of costs, however, the Court will permit the defendant's answer to be read in his own behalf (*r*); and it has been held, that a peer's answer upon protestation of honour may also be read on the question of costs, on behalf of the defendant who has put it in (*s*).

But plaintiff can have no decree against a denial by answer upon the evidence of one witness only.

Although a defendant cannot read his own answer as evidence for himself, as to any other point than that of costs, he is entitled to have benefit by his answer, so far as it amounts to a denial of the plaintiff's case, unless the denial by the answer is contradicted by the evidence of more than one witness; the rule of Courts of Equity being, *that where the defendant, in express terms negatives the allegations in the Bill, and the evidence of one person only affirms what has been so negatived, then the Court will neither make a decree, nor send it to a trial at law* (*t*).

Provided the denial be positive.

The denial, however, by the answer, must in such cases be *positive*, otherwise the rule will not apply; as where a defendant, by his answer, denies a fact as to his *belief* only (*u*).

Reason of the rule.

The reason for the adoption of this rule, by the Courts, is, because there being a single deposition only, against the oath of the defendant in his answer, the denial of facts by the answer is equally strong with the affirmation of them by the de-

(*r*) Vancouver v. Bliss, 11 Ves. 458; Howell v. George, 1 Mad. 1.

(*s*) Dawson v. Ellis, 1 Jac. & W. 524.

(*t*) Pember v. Mathers, 1 Bro. C. C. 52. Vide etiam Kingdome v. Boakes, Prec. in Ch. 19; Wakelin v. Wathell, 2 Ch. Ca. 8; Earl of Arglasse v. Muschamp, 1 Vern. 135; Alam v. Jourdan ib. 161; Christ's Coll. Cam. v. Widdrington, 2 Vern. 283; Hine v. Dodd, 2 Atk. 276; Glynn v. Bank of England, 2 Ves. 38; Mortimer v. Orchard, 2 Ves. Jr. 243; Canons of St. Paul's v. Crickett, ib. 563; Lord Cranstown v. Johnston, 3 Ves. 171; Cooth v. Jackson, 6 Ves. 40; Evans v. Bicknell, ib. 174; Cooke v. Clayworth, 18 Ves. 12.

(*u*) Arnot v. Biscoe, 1 Ves. 95; Hughes v. Garner, 2 Young & Coll. 328.

position; where, therefore, there are any corroborative circumstances in favour of the plaintiff's case, which give a preponderence in his favour, the Court will depart from the rule, and either make a decree, or direct an issue (*x*). Thus where a Bill was filed for the specific performance of an ageement, which the defendant denied by his answer; but the agreement was proved by one witness, and there was also evidence to prove the defendant's confession of it, besides other corroborative circumstances, a decree was made (*y*). So where a defendant had denied notice of a previous mortgage, which, however was proved by a single witness, and it was also proved by other evidence, that upon an application being made to the defendant, on behalf of the previous mortgage, for an account, he observed, 'You have no right, for your mortgage is not registered;' Lord Redesdale held, that the testimony of the witness, who proved the notice directly, was confirmed by that observation, which shewed that the defendant had investigated the subject, and relied on the neglect to register the mortgage (*z*).

Upon the record.

Rule will not apply where there are corroborative circumstances.

Upon the same principle, where a parol agreement, with part performance is insisted upon in a Bill, and the agreement is denied by the answer, yet if it is proved by one witness, and supported by circumstances of part performance, such as delivery of possession, the specific performance of the agreement has been decreed (*a*). It may be observed, however, that even in such cases, if the defendant, by his answer, denies the agreement set up by the Bill, and his denial is confirmed by circumstances, the Court will not decree a specific performance, although the case made by the Bill is corroborated by one witness (*b*). And where a particular agreement by parol, (viz., an agreement to grant a lease for three lives,) was stated in the Bill and proved by one witness and confirmed by acts of part performance; but the answer admitted an

(*x*) Pember v. Mathers, 1 Bro. C. C. 53; Walton v. Hobbs, 2 Atk. 19; Janson v. Rany, ib. 140; Hine v. Dodd, ib. 276.

(*y*) Only v. Walker, 3 Atk. 407.

(*z*) Biddulph v. St. John, 2 Sch. & Lef. 532.

(*a*) Morphett v. Jones, 1 Swanst. 172.

(*b*) Pilling v. Armitage, 12 Ves. 78.

Upon the record.

agreement for one life only, and was supported by the testimony of one witness, the Court refused to decree for the plaintiff, the evidence of part performance being equally applicable to either agreement (*c*).

But the Court will grant an issue,

But although the Court will, where there are corroborating circumstances, depart from its rule of making no decree against the defendant's positive denial of the plaintiff's case, where such case is supported by the deposition of one witness only, it will not do so without allowing the defendant, if he is disposed to avail himself of it, an opportunity of trying the question at law, and will direct an issue for that purpose (*d*). In doing this, however, the Court of Chancery does not leave the Court of Law to proceed entirely upon its own rules of evidence; to do so, would, in fact, be to place the investigation before a jury upon such a footing, that only one result could attend it, *viz.*, a verdict against the defendant; for, as the Court of Common Law, without attending to the denial by the defendant's answer, would consider the evidence of one witness only as sufficient to entitle the plaintiff to a verdict, it is obvious that the mere giving the defendant an issue would in fact be giving him no advantage whatever; the Court of Equity, therefore, to obviate this disadvantage, sends the case to the Court of Law, to be decided upon according to the Rules of Equity. This it does by ordering the answer of the defendant to be read as evidence, upon the trial of the issue (*e*), for the purpose of allowing the defendant to have it contrasted with the evidence of the witnesses (*f*).

and direct defendant's answer to be read at the trial;

—but not unless asked for by defendant.

As the practice of directing an issue in a case of this description, is one intended entirely for the satisfaction of the defendant, it is by no means compulsory upon the defendant to take one, and if the defendant declines an issue, the Court itself is bound to give judgment upon the question, whether the circumstances outweigh the effect of the rule, so as to authorize a decree against the denial in the answer (*g*).

(*c*) Lindsay v. Lynch, 2 Sch. & Lef. 1; Ante, v. 1, pp. 495, 514.

(*d*) E. I. Company v. Donald, 9 Ves. 275.

(*e*) Ibbotson v. Rhodes, 1 Eq. Ca. Ab. 229, pl. 13; 2 Vern. 554. S. C.; Pember v. Mathers, 1 Bro. C. C. 52; E. I. Company v. Donald, 9 Ves. 275.

(*f*) Savage v. Brocksopp, 18 Ves. 335-7.

(*g*) E. I. Company v. Donald, ubi supra.

II. Admissions by agreement between the parties, are those which, for the sake of saving expense or preventing delay the parties, or their Solicitors, agree upon between themselves.

By agreement.

With respect to admissions of this description, as they must depend entirely upon the circumstances of each case, little can now be said respecting them, beyond drawing to the practitioner's notice the necessity there exists that they should be clear and distinct. In general, they ought to be in writing, and signed either by the parties or their Solicitors; the signature of the Solicitor employed by the party, being considered sufficient to bind his principal, the Court inferring that he had authority for that purpose (*h*).

—in general, are in writing, and signed by the parties or their solicitors;

It does not, however, appear to be necessary that an agreement to admit a particular fact should be in writing; and where, at law, the plaintiff's attorney swore that he had proposed that the defendant should acknowledge a warrant of attorney, so as to enable the deponent, if it should become necessary, to enter up judgment thereon, and that the defendant had accepted his offer; Lord Eldon, C. J., considered it well proved, that the defendant had agreed to acknowledge the instrument for all purposes, and that the plaintiff was at liberty to act upon the instrument without the necessity of producing the subscribing witness (*i*).

—but not necessarily in writing.

It is to be remarked, that although the Courts are disposed to give every encouragement to the practice of parties or their Solicitors agreeing upon admissions among themselves, they will not sanction an agreement for an admission by which any of the known principles of law are evaded; and, therefore, where a husband was willing that his wife should be examined as a witness in an action against him for a malicious prosecution, Lord Hardwicke refused to allow her examination, because it was against the policy of the law to allow a woman to be a witness, either for or against her husband (*k*). Upon the same principle, where the law requires an instrument to be stamped in order to its validity, the Court will not give effect to an

Must not be contrary to policy of the law.

Agreement that a wife should be a witness for or against husband, void.

To waive an objection for want of a stamp void.

(*h*) Young v. Wright, 1 Campb. N. P. 139; Gainsford v. Gammer, 2 Campb. N. P. 9; Laing v. Raine, 2 Bos. & P. 85.

(*i*) Marshall v. Cliff, 4 Campb. N. P. 133.

(*k*) Barker v. Dixie, Rep. t. Hardwicke, 264.

By agreement. agreement between the Solicitors to waive the objection arising from its not being stamped (*l*).

Admissions by Infants.

The question how far an infant is bound by admissions made on his behalf, has been already discussed in a former part of this treatise (*m*).

Sect. II.

Of the Onus Probandi.

Matters to be proved.

Having ascertained what matters are to be considered as admitted between the parties, either by the pleadings or by agreement, the next step is to consider what proofs are to be adduced in support of those points which are not so admitted; but before we proceed to the nature of those proofs, it will be right to devote a few pages to the consideration of what the subjects are to which they are to be applied.

Onus probandi rests, in general, upon the party asserting the affirmative.

In considering the question of what matters are to be proved in a cause, the first point to be ascertained is, upon whom the burthen of the proof lies? And here it may be laid down, as a general proposition, that the point in issue is to be proved by the party who asserts the affirmative, according to the maxim of the civil law—'*Ei incumbit probatio qui dicit, non qui negat* (*a*).' This rule is common, as well to Courts of Equity as to Courts of Law, and, accordingly, when a defendant insists upon a purchase for a valuable consideration, without notice, the fact of the defendant, or those under whom he claims, having had notice of the plaintiff's title, must be proved by the plaintiff (*b*). So where a feme covert, having a separate property, had joined with her husband in a security for money which it was the object of the Bill to recover from her, (her husband being dead,) and the defendant, by her answer, admitted that she had signed the security, but alleged that she

(*l*) Owen v. Thomas, 3 M. & K. 353-7.

(*m*) Ante, v. 1, p. 238.

(*a*) 1 Phillips on Evid. 191.

(*b*) Eyre v. Dolphin, 2 Ball & B. 303; Saunders v. Leslie, ib. 515; Ante, p. 224.

had done so, not of her own free will, but under the influence of her husband; the Master of the Rolls, (Sir John Leach,) held, that it lay upon the wife to repel the effect of her signature, by evidence of undue influence, and not upon the plaintiff to prove a negative (*c*). And, in general, it may be taken for granted, that wherever a *prima facie* right is proved, or admitted by the pleadings, the *onus probandi* is always upon the person calling such right in question (*d*); therefore, in a suit by a rector for tithes, the right of the plaintiff to the rectory being proved or admitted, was considered as shewing a *prima facie* right in the plaintiff to all tithes throughout the parish, and, consequently, the duty of proving an exemption from the payment of any of such tithes was thrown upon the defendant. And here it may be observed, that a Court will always treat a deed or instrument as being the thing which it purports to be, unless the contrary is shewn; and, therefore, it is incumbent upon the party impeaching it, to shew that the deed or instrument in question is not what it purports to be; therefore where a bond, which was upon the face of it a simple money-bond, was impeached as being intended merely as an indemnity-bond, it was held that the burthen of proving it to be an indemnity-bond, lay on the party impeaching it (*e*). So, if a party claims two legacies under two different instruments, the burthen of shewing that he is only entitled to one, will lie upon the person attempting to make out that proposition; for the Court will assume that the testator, having given the two legacies by different deeds, meant to do so, till the contrary is established (*f*). Indeed, in all cases where the presumption of law is in favour of a party, it will be incumbent on the other party to disprove it, though in so doing he may have to prove a negative; therefore, where the question turns on the legitimacy of a child, if a legal marriage is proved, the legitimacy is presumed, and the party asserting the illegitimacy ought to prove it (*g*); for the presumption of law is, that a child born of a married

Upon whom it rests.

Improper influence.

Where a *prima facie* case is made,

onus probandi upon a person disputing it.

And so in all cases where presumption at law is in favour of one party,

burthen of proof must be by the other.

(*c*) Field v. Sowle, 4 Russ. 112.
(*d*) Banbury Peerage, 1 S. & S. 156.
(*e*) Nicol v. Vaughan, 6 Bligh's N. R. 104; 1 Clark & Fin. 49.
(*f*) Hooley v. Hatton, 2 Dick. 461. Where two legacies are given to the same legatee, by the same instrument, the presumption is the other way. Ibid.
(*g*) 1 Phil. on Evid. 197.

Onus probandi. woman whose husband is within the four seas, is legitimate, unless there is irresistible evidence against the possibility of sexual intercourse having taken place (*h*).

Rule in cases of insanity, &c.

It is important, in this place, to notice that in cases where it is sought to impeach a will, or other instrument, on the ground of insanity, the rule as to the *onus probandi* is, that 'where a party has been subject to a commission, or to any restraint permitted by law, even a domestic restraint, clearly and plainly imposed upon him in consequence of undisputed insanity, the proof shewing sanity is thrown upon him, or upon them claiming under him.' On the other hand, where insanity has not been imputed by relations and friends, or even by common fame, the proof of insanity which does not appear to have ever existed, is thrown upon the party asserting it; and it is not to be made out by rambling through the whole life of the individual, but must be applied to the particular date of the transaction (*i*).

—lucid interval.

It has also been held, that where general lunacy has been established, and a party insists upon an act done during a lucid interval, the proof is thrown upon the party alleging the lucid interval; and that, in order to establish such an interval, he must prove something beyond a mere cessation of violent symptoms, viz. a restoration of mind to the party sufficient to enable him to judge soundly of the act (*k*).

Sect. III.

Confined to Matters in Issue.

Facts not noticed in the pleadings, cannot be proved

It is a fundamental maxim, both in this Court and in Courts of Law, that no proof can be admitted of any matter which is

(*h*) Head v. Head, 1 S. & S. 150; 1 Turn. & R. 138. S. C. Vide etiam Bury v. Phillpot, 2 M. & K. 349. As to other instances in which the presumption of law being in favour of the party, the Court will throw the *onus probandi* upon the opposite side; vide 1 Phil. & Amos on Evid. 461.

(*i*) White v. Wilson, 13 Ves. 87, 88, and vide The Attorney-General v. Parnther, 3 Bro. C. C. 441.

(*k*) Hall v. Warren, 9 Ves. 605, 611.

not noticed in the pleadings (*a*); this maxim has been adopted in order to obviate the great inconvenience to which parties would be exposed, if they were liable to be affected by evidence at the hearing, of the intention to produce which they had received no notice. In a former part of this treatise, the operation of this rule, in requiring the introduction into a Bill of every fact which the plaintiff intends to prove, has been pointed out (*b*): it has also been shewn that the same rule applies to answers, and that a defendant cannot avail himself of any matter in his defence which is not stated in his answer, although it should appear in his evidence (*c*); little, therefore, remains to be noticed with reference to this part of the subject. It is, however, to be observed, that, in certain cases, evidence of particular facts may be given under general allegations, and that, in such cases, therefore, it is not necessary the particular facts intended to be proved should be stated in the pleadings. The cases in which this exception to the general rule is principally applicable, are those where the character of an individual, or his general behaviour, or quality of mind comes in question; as where, for example, it is alleged that a man is *non compos*, it is the experience of every day that you give particular acts of madness in evidence, and not general evidence only that he is insane (*d*). So where you charge that a man is addicted to drinking, and liable to be imposed upon, you are not confined, in general, to his being a drunkard, but particular instances are allowed to be given (*e*). In like manner, where the charge in a Bill was, that the defendant was a lewd woman, evidence of particular acts of incontinence was allowed to be read (*f*). In cases of this nature, however, it is necessary, in order to entitle the party to read evidence of particular facts, that they should be pointed directly to the charge; therefore, it has been held, that an allegation in a Bill,

Effect of a general charge.

—in admitting evidence of particular facts. Where character, behaviour, or quality of mind, is in issue, —*e.g.* insanity;

—or a habit of drinking,

—or lewdness.

Special facts must be pointed to the general charge

(*a*) Whaley v. Norton, 1 Vern. 483; Gordon v. Gordon, 3 Swanst. 472; Clarke v. Turton, 11 Ves. 240; Williams v. Llewellyn, 2 Y. & J. 68; Hall v. Maltby, 6 Pri. 240, 259; Montesquieu v. Sandys, 18 Ves. 302; Powys v. Mansfield, 6 Sim. 565.

(*b*) Ante, vol. 1, p. 430.

(*c*) Ante, p. 240; Smith v. Clarke, 12 Ves 477.

(*d*) Clark v. Periam, 3 Atk. 333, 340.

(*e*) Ibid.

(*f*) Ibid. Vide etiam the cases there cited.

Effect of a general charge.

that a wife *had misbehaved herself*, did not imply that she was an adultress, and that a deposition to prove her one ought not to be read (*g*). And so the m[illegible] saying that a wife did not behave herself as a virtuous woman, will not entitle her husband to prove that she has committed adultery, unless there is an express charge of the kind, for the virtue of a woman does not consist merely in her chastity (*h*).

When misbehaviour in office is charged.

The question how far particular acts of misconduct can be given in evidence under a general charge of misbehaviour, appears to have been much discussed bofore Lord Talbot, in *Wheeler* v. *Trotter* (*i*): the case was that of a Bill filed for the specific performance of an agreement to grant a deputation of the office of Registrar of the Consistory Court; and, amongst other defences set up by the defendant's answer, it was alleged that the plaintiff was not entitled to the assistance of the Court, because he had not accounted for divers fees which he had received under a deputation authorizing him to execute the office, and had taken several fees which were not due, and concealed several instruments and writings belonging to the office, &c. Upon the defendant's attempting to read proofs as to the misbehaviour alleged in such general terms by his answer, it was objected, on the part of the plaintiff, that the charges were too general, as the plaintiff could not tell what proof to make against them, unless he examined every particular fee he had received, and also every instrument that had come to his hands; and that the defendant should have pointed out the particular facts in his answer, so that the plaintiff might be enabled to know how to clear himself by his proof; and the case was assimilated to that of an action at common law for a breach of covenant to repair, where if the defendant pleads that he left the premises in repair, the plaintiff must, in his replication, shew particularly what part is out of repair; and to an indictment for barratry, which may be general, yet the prosecutor is always obliged to give the defendant a list, upon oath, of the particular matters that are intended to be proved:

(*g*) Clark v. Periam, ubi supra, Sidney v. Sidney, 3 P. Wms. 269.

(*h*) Lord Donerail v. Lady Donerail, cited 2 Atk. 338.

(*i*) 3 Swanst. 174 (n).

but the Lord Chancellor held, that although the matters intended to be proved might have been more precisely put in issue by enumerating the particular facts, yet, as they were not intended to charge the plaintiff with any particular sums received more than were accounted for, but to shew a general misbehaviour of the plaintiff in his office, so that a Court of Equity should not help him; he thought that, for this purpose, they were sufficiently put in issue.

Effect of a general charge.

The cases in which evidence of particular facts may be given under a general allegation or charge, are not confined either to cases in which the character or quality of mind or general behaviour of a party comes in issue; the same thing may be done where the question of notice is raised in the pleadings by a general allegation or charge. Thus, where the defence was a purchase for a valuable consideration, without notice of a particular deed; but, in order to meet that case by anticipation, the Bill had suggested that the defendant pretended that she was a purchaser for a valuable consideration, without notice, and simply charged the contrary; the deposition of a witness who proved a conversation to have taken place between himself and a third person, who was the Solicitor of the defendant, and the consequent production of the deed, was allowed to be read as evidence of notice (*m*).

Where notice is charged,

It is to be observed, that the question whether the party had notice or not, is a *fact;* and that, the fact of the defendant having had notice having been put in issue, the mode in which the fact was to be proved was not important to be put upon the record; for the rule that no evidence will be admitted, at the hearing of any facts, but those which are mentioned in the pleadings, requires that the facts only intended to be proved should be put in issue, and not the materials of which the proof of those facts is to consist (*n*).

-facts only to be put in issue;

—not the materials of proof.

Thus, in a case of pedigree, if Robert Stiles be alleged to be the son of John Stiles, the fact to be proved is the relationship of Robert Stiles to John Stiles, and that may be done by any mode which the rules of evidence will allow, and it is not ne-

In case of pedigree.

(*m*) Hughes v. Garner, 2 Y. & C. 328.

(*n*) Blacker v. Phepoe, 1 Moll. 355.

Documentary evidence.

cessary to state that mode upon the record. It is upon this principle that documentary evidence, or letters themselves, are not specifically put in issue (*o*). In fact a party may prove his case, by written or *parol* evidence indifferently, and is under no more restrictions in one case than in another. It is not necessary to put every written document in issue. It would lead to the greatest inconvenience; for example, in mercantile or partnership cases, where perhaps a hundred letters may be required to establish the case, it would be impossible to put all those in issue; and it cannot be necessary to do so to enable the party to read them in evidence (*p*).

Letters and other documentary evidence admitted as evidence without being specifically noticed in the pleadings

—but not as admissions.

It is to be remarked, however, that, although letters and writings in the hands of a party may be proved and used as evidence of facts, they cannot be used as admissions or confessions of facts by the opposite party without being mentioned in the pleadings (*q*). For it is a rule, that if a letter or writing amounts to a confession or an admission, it must be put in issue, in order that the party against whom it is to be read, should have an opportunity to meet it by evidence or explanation (*r*). This rule, it is to be remarked, is not confined to writings, but applies in every case where the admission or confession of a party is to be made use of against him. Thus it has been held, that evidence of a confession by a party that he was guilty of a fraud, could not be read, because it was not distinctly put in issue (*s*). So, also, evidence of alleged conversations between a witness and a party to the suit, in which such party admitted that he had defrauded the other, was rejected, because such alleged conversations had not been noticed in the pleadings (*t*). 'No man,' observes Sir Anthony Hart, 'would be safe, if he could be affected by such evidence. Lord Talbot said, long ago, that if you are to oust a defendant for fraud alleged against him, and the fraud is proved by the acknowledgment

Admissions or confessions must always be put in issue;

—and so must conversations, where relied upon as confessions.

(*o*) Ibid.

(*p*) Per Sir Anthony Hart in Fitzgerald v. O'Flaherty, 1 Moll 351. Vide etiam Lord Cranstown v. Johnston, 3 Ves. 170.

(*q*) Houlditch v. Marquis of Donegal, 1 Mol. 365.

(*r*) Blacker v. Phepoe, 1 Moll. 354.

(*s*) Hall v Maltby, 6 Pri 240, 268; Mulholland v. Hendrick, 1 Moll. 359.

(*t*) Farrell v. ——, 1 Moll. 363.

of the defendant that he had no right to the matter in litigation, the plaintiff must charge that, on the record, to give him the opportunity to deny or explain and avoid it' (*u*).

Conversations.

It is to be observed, that it is only when conversations are to be used as admissions, that the rule, which requires them to be stated on the record, applies. Where the conversation is in itself the evidence of the fact, it need not be specially alluded to; as in the case of *Hughes* v. *Garner* (*x*), before referred to, where the notice was communicated to the defendant by a conversation, which was made use of to prove the fact of the conversation having taken place, and not as an admission by the party that he had received notice.

Substance of the case must be proved.

Another rule of evidence, which may be noticed in this place, is, *that the substance of the case made by the pleadings must be proved;* that is, all the facts alleged upon the pleadings which are necessary to the case of the party alleging them, and which are not the subject of admissions either in the pleadings or by agreement, must be established by evidence. Thus the plaintiff's title, as set out in the Bill, must be proved, whether the statement of it in the Bill was necessary or not. Upon this ground, where a Bill was filed in the name of one partner against another for an account, under a power of attorney authorizing the institution of the suit by the partner on whose behalf the Bill was filed, which power of attorney was stated in the Bill; Sir John Leach, V. C., although he held it to have been quite unnecessary to state the power of attorney in the Bill, was of opinion, that, as it had been stated, it ought to have been proved; and because this had not been done, he directed the Master to inquire whether the parties who had instituted the suit were authorized to prosecute the same in the name of the plaintiff (*y*).

Title of the plaintiff.

In the case of a plaintiff, however, it is sufficient to prove so much only of the allegations in the Bill as are necessary to entitle him to a decree. Thus, where the suit is for an account, all the evidence necessary to be read at the hearing, is, that which proves the defendant

But only so much of the allegations as will entitle the plaintiff to a decree.

(*u*) Farrel v. ——, 1 Moll. 363.

(*x*) 2 Y. & C. 328.

(*y*) Edney v. Jewell, Mad. & Geld. 165.

In suits for account.

to be an accounting party, and then the decree to account follows of course; and any evidence as to the particular items of an account, however useful they may be in a subsequent stage of the cause, would be irrelevant at the original hearing. For this reason, where the suit is against an administrator or an executor, all that it is necessary to prove, on the part of the plaintiff, is, that the defendant fills and has acted in that character. This point was much discussed before Lord Gifford, M. R., in *Law* v. *Hunter* (z). There the defendant, who had principally acted as executor of the testator, admitted that he had received personal estate of the testator to the amount of from 35,000*l.* to 40,000*l.*; and the plaintiff, having gone into very voluminous evidence to shew how much of the personal estate of the testator had come into the defendant's hands, in order to prove that he had received assets to a much larger amount than that admitted by the answer, proposed to enter such evidence as read; but the Master of the Rolls would not permit it to be done, as the only tendency of such evidence was to shew the state of the account, which the Court itself could not inquire into, but must refer to the Master, as the proper person for taking the account. The same principle was afterwards acted upon, by the same learned judge, in *Walker* v. *Woodward* (a), where, upon a Bill for an account, the liability to account having been admitted by the defendant, he had entered into evidence to prove items of his discharge, but was not suffered to read them at the hearing.

Where proofs are deficient,

leave will be given to exhibit interrogatories.

It may be noticed here, that sometimes, where, through inadvertence or negligence, the plaintiff has omitted to prove some particular fact which is necessary to support his case, the Court will permit him to supply the defect by giving him leave to exhibit interrogatories to prove the fact omitted. This is frequently done in the case of wills disposing of real estates (b), where either the plaintiff has relied upon the admission of the will by answer, which the Court thinks not sufficiently full (c), or where the absence or death of one of the witnesses to the

(z) 1 Russ. 101.
(a) 1 Russ. 107.
(b) Lechmere v. Brasier, 2 Jac. & W. 288.
(c) Potter v. Potter, 1 Ves. 274.

will (*d*); or the testator's sanity (*e*) has not been proved. In a recent case, where the plaintiffs sued as devisees, but omitted to prove the will, and the Bill was consequently dismissed; they afterwards presented a petition of re-hearing, and moved for leave to exhibit interrogatories to prove the will; the motion was granted, it clearly appearing that the omission had arisen from the inadvertence of Counsel, and that the will was not a subject of dispute in the cause (*f*).

Leave to exhibit further interrogatories.

The practice of the Court, in this respect, is not confined to cases of wills: a cause has been ordered to stand over, for the purpose of allowing interrogatories to be exhibited, to shew the due execution of a deed which has been omitted to be proved (*g*); or the death of a party (*h*); or the fact of trading (*i*). So where the plaintiff had relied upon the admission of facts by the answers, and it was held, that, some of the defendants being married women, the admissions in their answers would not bind them; the Court of Exchequer allowed the case to stand over, with liberty to the plaintiff to exhibit interrogatories (*k*). In like manner, where a plaintiff had obtained an order to prove a deed *viva voce* at the hearing, and, all the witnesses being dead, was not permitted to prove the handwriting of a deceased witness, the cause was allowed to stand over, with liberty to exhibit an interrogatory for that purpose (*l*). And where the evidence read at the hearing to prove the loss of a deed was held not sufficiently strong to entitle the party to read secondary evidence of its contents, the Master of the Rolls gave the plaintiff leave to exhibit an interrogatory to prove the loss of the deed more strictly (*m*). In general, orders of this nature are made upon a simple application by Counsel at the hearing of the cause. This, however, can only be done where the ground for making it appears satisfactorily to the Court, and is not re-

Generally upon application at the hearing.

(*d*) Wood v. Stane, 8 Pri. 613.
(*e*) Abrams v. Winshup, 1 Russ. 526; Wallis v. Hodgson, ib. 527, n; 2 Atk. 56, S. C.
(*f*) Hood v. Pimm, 4 Sim. 101
(*g*) Ore v. Johnson, Seton on Decrees, 363.
(*h*) Moons v. De Bernales, 1 Russ. 307.
(*i*) Lechmere v. Brasier, ubi supra.
(*k*) Hodgson v. Merest, 9 Pri. 563
(*l*) Bloxton v. Drewit, Prec. in Ch. 64
(*m*) Cox v. Allingham, Jac. 337.

Leave to exhibit further interrogatories.

quired to be established by other evidence. Where further evidence is required to enable the Court to make the order, application must be made either by petition (*n*), or by motion (*o*), supported by affidavit.

In what case petition or motion necessary.

In the case of *Edney* v. *Jewell* (*p*), which has been before referred to, the Court, instead of directing an interrogatory to be exhibited to prove the fact omitted, directed the Master to inquire into the fact; and it seems that, in some cases, the deficiency of proof against infants may be supplied in the same manner (*q*). It is not, however, the practice to grant a reference to inquire as to any facts which are the foundation of the relief, such as the execution of a will, or the fact of trading (*r*). The course in such case is, to order the cause to stand over, and direct the proofs to be supplied by means of interrogatories, in which case the depositions cannot be published without order (*s*), and the cause must be again set down (*t*). In some cases, the Court, instead of ordering the cause to stand over for the purpose of exhibiting interrogatories, will make a decree as to all that part of the case which is in a situation to be decided upon, and direct interrogatories to be exhibited to prove the rest. This is frequently done in the case of a will, where, although it is not sufficiently proved to affect the real estate, the Court will decree an account of the personal estate, with liberty to exhibit interrogatories to prove the will (*u*). It has likewise been done in the case of Bills for an account, where a decree for an account has been made, although one of the parties has not been proved to be out of the jurisdiction, with liberty to supply the proof by exhibiting an interrogatory (*x*).

Reference to the Master to inquire into the fact, never granted as to any facts which are the foundation of relief.

In what cases the Court will make a partial decree.

(*n*) Cox v. Allingham, Jac. 337.

(*o*) Attorney-General v. Thurnall, 2 Cox, 2.

(*p*) Mad. & Geld. 165.

(*q*) Vide Quantock v. Bullen, 5 Mad. 82.

(*r*) Lechmere v. Brasier, 2 Jac. & W. 288. Vide Elgar v. Coleman; and Hagden v. Bousey, Seton on Decrees, 365.

(*s*) Rossiter v. Pitt, 2 Mad. 165.

(*t*) Lechmere v. Brasier, ubi supra.

(*u*) Ibid.

(*x*) Butler v. Borton, 5 Mad. 42.

SECT. IV.

Of the Effect of a Variance.

Of variance between the statement and proof.

IT is not only necessary that the substance of the case made by each party should be proved, but *it must be substantially the same case as that which he has stated upon the record;* for the Court will not allow a party to be taken by surprise by a case proved on the other side different from that set up by him in the pleadings. Courts of Law are very strict in the application of this rule, particularly in cases of actions upon contracts (*a*), or upon prescriptions (*b*); and although Courts of Equity, perhaps, allow of a little more looseness, still they require a strict conformity between the proofs and the pleadings in the same matters. Thus the specific performance of an agreement to grant a lease for three lives, cannot be decreed upon what amounts to evidence of an agreement to grant only for one life (*c*). The principles which guide the Court in matters of this description, are clearly stated by Lord Redesdale in his judgment in *Deniston* v. *Little* (*d*), where his Lordship lays down the general practice of the Court to be, to compel parties who come for the execution of agreements, to state them as they ought to be stated, and not to set up titles, which, when the cause comes to a hearing, they cannot support.

We have seen, in a former part of this treatise, that, in Bills where the rights asserted are founded in prescription, a considerable degree of certainty is required in setting out the plaintiff's case (*e*); to this may be added, in this place, that, in general, the proof must correspond in certainty with the case so set out. Thus the Court of Exchequer, in deciding upon tithe questions, was in the habit of requiring that the proof of

(*a*) Phil. & Amos, 855.

(*b*) Ibid. 857.

(*c*) Lindsay v. Lynch, 2 Sch. & Lef. 1. Vide etiam Mortimer v. Orchard, 2 Ves. Jun. 243; Legh v. Haverfield, 5 Ves. 453; Woollam v. Hearn, 7 Ves 222; Deniston v. Little, 2 Sch. & Lef. 11 n.; Savage v. Carroll, 2 Ball & B. 451; Daniels v. Davison, 16 Ves. 249.

(*d*) Ubi supra

(*e*) Ante, v. 1, p. 478.

Effect of variance.

a modus should correspond with the modus as laid in the Bill (*d*). And so in other cases, where particular customs are prescribed for, the evidence is in general required to be in conformity with the statement in the pleadings. In *The Dean and Chapter of Ely* v. *Warren* (*e*), however, Lord Hardwicke said, that the Court of Chancery would not put persons to set forth a custom with so much exactness as is requisite at law, or with so much nicety as the Court of Exchequer expects.

We have seen before, that in some cases, where a plaintiff has alleged a different agreement, in his Bill, from that which has been admitted by the answer, the Court has permitted the plaintiff to amend his Bill by abandoning the first agreement and insisting upon that stated upon the answer (*f*); yet the ordinary practice is to dismiss the Bill with costs, without prejudice to the plaintiff's bringing a new Bill (*g*). In *Mortimer* v. *Orchard* (*h*), however, where the plaintiff had prayed the specific performance of an agreement stated in the Bill, but proved a parol agreement which was quite different, Lord Loughborough, (although he thought the Bill ought to be dismissed, yet, as there had been a partial execution of some agreement between the parties, by the building of a house,) directed a reference to the Master, to settle a lease pursuant to the agreement confessed in the answer.

The rules which have just been discussed, relate to the general aim or tendency of the proof to be adduced; there are other rules relating to the *medium* of proof, independently of its tendency, which might properly be introduced in this place, such as the General Rules, *that the best evidence which the nature of the case admits, ought to be produced*, and *that hearsay of a fact is not admissible*. A clear knowledge of the principles upon which these rules are founded, and of the consequences deduced from

(*d*) Scott v. Fenwick, 3 Eagle & Y. 1318; Uhthoff v. Lord Huntingfield, cited 1 Pri. 237; 2 Eagle & Y. 649, S. C.; Prevost v. Benett, 1 Pri. 236; 3 Eagle & Y. 705, S. C.; Blake v. Veysie, 3 Dow. 189; 2 Eagle & Y. 699; Miller v. Jackson, 1 Y. & J. 65.

(*e*) 2 Atk. 190.

(*f*) Ante, vol. 1, p. 513.

(*g*) Lindsay v. Lynch, 2 Sch. & Lef. 1; Woollam v. Hearn, 7 Ves. 222; Deniston v. Little, 2 Sch. & Lef. 11 (n).

(*h*) 2 Ves. J. 243.

Effect of variance.

them, as well as of the exceptions to which they are liable, is very important to a person advising upon the evidence to be produced by a party to a suit in equity; but a discussion of such matters would extend this treatise, already too long, far beyond all reasonable limits, besides which, they have been already treated of with so much skill in the valuable Treatises on Evidence, which have been already published, one of which at least must or ought to be in the hands of every practitioner, upon whom the duty of advising upon evidence is likely to devolve, that a further reference to them in this place appears wholly unnecessary. The writer, therefore, will content himself with simply observing, that the rules as to evidence are the same in Equity as at Law (*k*), and that what the reader will find to be laid down in any of those treatises to be the rule of evidence in Courts of Law, will, in most cases, be applicable to cases in Courts of Equity.

PART II.—OF DOCUMENTARY EVIDENCE.

SECT. 1.—*Documentary Evidence—which proves itself.*

General nature of evidence.

HAVING endeavoured to direct the practitioner's attention to the matters which it will be necessary for him to establish by evidence in the cause, the next thing to be considered is the nature of the proofs by which such matters are to be substantiated. The subject, however, which thus offers itself to our notice, is one of great intricacy and importance, and to discuss it fully would require a complete treatise on the law of evidence; it is obvious, therefore, that in a work like the present, such a discussion would be impossible, without swelling the book to a size totally inconsistent with its practical utility;

(*k*) Manning v. Lechmere, 1 Atk. 453; Glynn v. Bank of England, 2 Ves. 41.

General nature of.

all therefore, that will be done on the present occasion, will be succinctly to call the reader's attention to the different descriptions of proofs which are applicable to a case in equity, and to the methods provided by the practice of the Court, for making such proofs available.

Division of proofs.

For this purpose the most convenient course appears to be to divide the subject of evidence, into, I. Documentary or written evidence; and, II. Oral or unwritten evidence.

Documentary evidence.

I. *Documentary or written evidence* consists of all those matters which are submitted to the Court in the shape of written documents. It is not of course intended to include in this definition, the depositions of witnesses examined in the cause, for, although, by the practice of Courts of Equity, the evidence to be derived from the parol examination of witnesses, is set down in writing and brought before the Court in that form, yet this does not vary the nature of the evidence itself, which, being spoken by the witness *vivâ voce* to the person by whom he was examined, does not, from the circumstance of its being by him committed to writing, for the more convenient use of it before the judge, lose its parol character.

—which proves itself.

It is to be observed, that some descriptions of documentary evidence are admitted by the Court without the necessity of any proof being gone into to establish their validity, whilst others require the support of parol testimony before they can be received.

In order, therefore, to the due consideration of the practice relating to documentary evidence, it seems right to treat, *first*, of documents which require no evidence to support them, or which, in other words, prove themselves, and *secondly*, of documents which require parol proof.

Amongst documentary evidence which proves itself, may be ranked,

Printed copies of Acts of Parliament, public.

1. All printed copies of public Acts of Parliament, printed by the King's printer, whether in books or separate Acts,

which are resorted to by Courts of Justice, not strictly as evidence, but as serving to refresh the memory (*a*), with reference to which, it may be observed, that by the Statute 41 Geo. 3, c. 90, s. 9, made for the better and more effectual proof of the Statute Law of this country in Ireland, and of the Irish Statute Law in Great Britain, it is enacted that copies of the Statutes of Great Britain and Ireland before the union, shall be received as conclusive evidence of the several Satutes in the Courts of either kingdom.

Acts of Parliament.

Irish Acts before the union.

2. Printed copies of Acts of Parliament, not public Acts, in which a special clause is inserted that they shall be printed by the King's printer, and that a copy so printed shall be admitted as evidence of the Act. When a private Act of Parliament, not containing such a clause, is required in evidence, the regular proof is by an examined copy compared with the original, in the Parliament Office at Westminster (*b*).

Not public.

Private Acts, how proved.

3. Exemplified copies of records in other Courts of Justice, under the Great Seal of Great Britain, or under the seals of the Courts themselves. The seal of the King, and of the superior Courts of Justice, and of the Courts established here by Acts of Parliament, are admitted in evidence without extrinsic proof of their genuineness; as, for example, the seal of the county palatine of Chester, or of the Ecclesiastical Court on an exemplification of a will (*c*). But the seal of a foreign or Colonial Court (*d*), or of a Corporate Body, ought to be proved by a witness acquainted with the impression (*e*). The seal of the Corporation of London has, however, been held to prove itself (*f*).

Copies of records under seal.

It is to be observed, that besides exemplifications and copies under seal, certain copies of records of Courts of Justice, though not under seal, are admissible as evidence without the necessity of further proof, provided they are signed by the proper officer; it being a general rule that a copy authen-

—Not under seal.

If signed by the proper officer.

(*a*) Gilb. on Evid. 8.
(*b*) 1 Phil. & Amos, 611.
(*c*) Ibid. 613.
(*d*) Ibid. 623.
(*e*) Ibid. 647.
(*f*) Morres v. Thornton, 8 T. R. 307.

Copies of records.

ticated by a person appointed for that purpose, is good evidence of the contents of the original, without any proof of its being an examined copy (*e*). Thus the *chirograph* of a fine is evidence of the fine, the chirographer being the officer appointed to give out copies of the agreements between the parties, which are entered of record (*f*). So an indorsement by the proper officer on a deed of bargain and sale, enrolled according to the form of the Statute 27 Hen. 8, c. 16, is evidence of the enrolment (*g*). And an endorsement of the date of the enrolment by the Clerk of the enrolments, is part of the record, and conclusive as to the date (*h*).

Under General Registry Act.

By the General Registry Act, 6 & 7 Wm. 4, c. 8, s. 38, it is enacted, that certified copies of entries purporting to be sealed or stamped with the seal of the Register Office, shall be received as evidence of the birth, death, or marriage, to which the same relates, without any further or other proof of such entry, and that no certified copy, purporting to be given in the said office, shall be of any force or effect which is not sealed or stamped as aforesaid.

Secus, where officer signing the same, has no authority to make out copies.

It is to be remarked, that the person signing the copy must be an officer whose duty it is to make out a copy of the record, otherwise his signature would not render it authentic. Thus, if an officer of the Court be only entrusted with the custody of the records, and is not authorized to make copies of them, he has no more authority for that purpose than an ordinary person, and the copy must be proved in the strict and regular mode. Thus the office copies of depositions in the Court of Chancery, though they are evidence in the Court of Chancery, because the Court will give credit to its own officer, will not be admitted in Courts of Common Law, without examination with the record (*i*).

(*e*) 1 Phil. & Amos, 614.

(*f*) Ibid.

(*g*) Ibid.; and vide etiam Kinnersley v. Orpe, Doug. 56. It would seem, that the signature of the certifying officer should be proved, unless where it is otherwise provided by statute; as by Bankrupt Act, 2 & 3 W. 4. c. 114, s. 3.

(*h*) The King v. Hopper, 3 Price, 495; Garrick v. Williams, 3 Taunt. 340; Selby v. Harris, 1 Ld. Raym. 745; Duncan v. Scott, 1 Campb. N. P. 101.

(*i*) 1 Phil. & Amos, 315.

So where a fine is to be proved with proclamations, as it must be to bar a stranger, the proclamations ought to be examined with the roll; for though the chirographer is authorized to make out copies of the fine itself, he is not appointed to copy the proclamations (*k*).

Depositions of witnesses in other Courts.

Copies of records which are not authenticated in any of the ways above mentioned, must be proved, as other transcripts, by a witness who has examined the copy line for line with the original, or who has examined the copy while another person has read the original (*l*). And it is to be remarked that, in proving a copy of a record, it ought to be made to appear that the original came from the proper place of deposit, or out of the hands of the officer in whose custody the records are kept; but that, when an ancient record has been lost, a copy may be read without proving it a true copy (*m*).

Transcripts of records not under seal, &c., how proved.

Where original has been lost.

Amongst the records of other Courts of Justice, copies of which the Court of Chancery is in the habit of receiving as evidence, may be ranked the depositions of witnesses, and proceedings taken in causes in other Courts of Equity of concurrent jurisdiction, which are frequently read as evidence in the Court of Chancery in causes between the same pa... Thus depositions taken in the Court of Exchequer, may be read as evidence in Chancery in a cause relating to the same matter, and between the same parties or their privies. The rules by which the Court is governed in receiving evidence of this description are the same as those adopted by it in cases where depositions taken in the Court of Chancery in one cause, are offered to be read in another. It is, however, to be remarked, that the depositions must be introduced as evidence in the ordinary course, and that an order of the Court directing the depositions in the Exchequer to be read at the hearing in Chancery, &c., will not be necessary or proper (*n*).

Depositions of witnesses in other Courts of Equity.

The ordinary method of proving depositions taken in one Court upon the hearing of a cause in another, is, by proving

—Must be introduced by proving copies of Bill, &c.

(*k*) Ibid.; Allen's case, Bull. N. P. 229, 3 Taunt. 166.

(*l*) 1 Phil. & Amos, 615.

(*m*) Ibid.

(*n*) Williams v. Broadhead, 1 Sim. 151.

Depositions of witnesses in other Courts.

an examined copy of the Bill and answer (*o*), unless the depositions are so ancient that no Bill and answer can be forthcoming (*p*), or unless the defendant has been in contempt or has had an opportunity of cross-examining, which he chose to forego, in which case the depositions may be read after proving the Bill only (*q*). It is to be noticed, also, that depositions may be used as evidence against a party to the suit, or for the purpose of contradicting the witness without proof of the Bill and answer, although some proof of the identity of the person will be required (*r*).

where depositions hav been taken und

Where the depositions have been taken on interrogatories, under a commission issuing out of another Court, they are not admissible without the production of the commission, under the authority of which they were taken; unless the depositions are of long standing, so that the commission may be presumed to have been lost, in which case they are evidence by themselves; but, in either case, whether the depositions are of a recent or ancient date, there is no occasion to produce the Bill and answer (*s*).

It is to be remarked, that although the subject of the admissibility of depositions taken in other suits, has been noticed in this place, it must not be understood that they come under the description of documentary evidence which proves itself, they must be proved like all other copies of record, not under seal by *examined* copies; office copies of them signed by the officer in whose custody they are, not being evidence for a reason above mentioned (*t*).

Proceedings in the Court of Chancery.

5. It has been before stated, that the Court of Chancery pays attention to its own proceedings, although they are not actually recorded (*u*). In illustration of which, it may be stated, that all the proceedings of the Court which are required as evidence in the cause, may be used as such, without

(*o*) Phil. & Amos, 628.
(*p*) Ibid.
(*q*) Ibid.
(*r*) Ibid.
(*s*) Ibid. 629.
(*t*) Ibid. It is to be observed, that in Williams v. Broadhead, 1 Sim. 151, which has been before referred to, the term *office* copy, has been introduced both into the text and marginal note for 'examined copy,' which is the only species of copy, which can be applicable to the case.
(*u*) Ante, p. 214.

further testimony to establish them than the production of the proceeding itself, or of an office copy of it, signed by the officer in whose custody such proceeding properly is, according to the practice of the Court.

Proceedings in Chancery.

But although it is the general rule of the Court, to pay attention to its own proceedings, it will not in all cases permit them to be read at the hearing of a cause, without an order specifically authorizing the party to read them. The cases in which the proceedings of the Court may be read without an order, are confined to those in which they have taken place in the cause itself, and to acts of the Court, such as decrees or orders made in another cause, between the same parties (*x*)

—cannot be read without order;

—unless they have taken place in the cause itself.

To entitle a party to read, at the hearing, the answers or depositions, or any other proceedings taken in *another* cause, an order is necessary, even though the suit be between the same parties (*y*). This distinction appears to have arisen from the former practice of the Court, which, in conformity with the practice of Courts of Law, required that when any proceedings in one cause were to be given in evidence in another, the foundation for the production of them, should be laid by proving the Bill and answer in the cause in which they were taken; gradually, however, this rule has been relaxed, and as the Court will now, as we shall hereafter see, in directing an issue to be tried at law, order the depositions in the cause to be read at the trial of the issue, so as to dispense with the strict proof which would otherwise be required of the Bill and answer,—so in the case of reading its own proceedings in another suit, it will dispense with the necessity of laying the regular foundation for such proof by the production of the Bill and answer, by making an order, that the party shall be at liberty, at the hearing, to read the depositions or other proceedings in the former cause: such an order is not necessary to entitle a party to read a decree or order, because, formerly, decrees and orders recited the pleadings upon which they were founded; and, even at common law, no further proof of them was required (*a*).

In what case an order is necessary.

(*x*) Brooks v. Taylor, Mos. 188.
(*y*) Hand. 114.
(*a*) Phil. & Amos, 619.

Proceedings in Chancery.

It is to be observed, that a decree or order of the Court of Chancery, determining a matter of right, is good evidence as to that right, not only against the party against whom the decree was made, but against all those claiming under him (*b*).

Decrees or orders in another suit.

But although a decree between other parties cannot be read as evidence, yet it may be read as a precedent (*c*). And it is not in any case necessary, in order that it should be admissible as evidence, that the parties to it should have filled the relative situations of plaintiff and defendant; if the present plaintiff and the defendant were co-defendants in the former cause, the decree in that cause may be read, though not as conclusive evidence (*d*). 'It frequently happens,' observes Lord Hardwicke, 'that there are several defendants, all claiming against the plaintiff, and having also different rights and claims among one another, the Court then makes a decree settling the rights of all the parties; but a declaration for that purpose could not be made, if this objection, ((viz.) to receiving the decree as evidence, because made between co-defendants,) holds, which would be very fatal, as it would occasion the splitting one cause into several' (*e*).

Depositions in another suit.

The depositions of witnesses, which have been taken in another cause between the same parties, may, as well as other proceedings in another cause, be read at the hearing by order.

In cross causes.

Thus evidence which has been taken in a cross cause may, by order, be read at the hearing of the original cause (*f*); and *vice versa*, provided the point in issue is the same in each case. Where the matter in issue is not the same, the depositions taken in one cause, cannot be read in the other; thus where a Bill was filed for tithes, and the defendant set up a modus of 11*d*. for every tenth lamb, 'and *so in proportion* for a less number,' and afterwards filed a cross Bill to establish his modus, but, in laying his modus, did not make use of the words '*and*

(*b*) Borough v. Whichcote, 3 Bro. P. C. 595.

(*c*) Austen v. Nicholas, 7 Bro. P. C. 9.

(*d*) Poulterers' Company v. Askew, 2 Ves. 89.

(*e*) Ibid. Vide etiam Chamley v. Ld. Dunsany, 2 Sch. & Lef. 710; Farquarson v. Seton, 5 Russ. 45.

(*f*) Lubiere v. Genou, 2 Ves. 579.

so in proportion, &c.' he was not allowed, at the hearing, to read the depositions taken in the original cause, as evidence in the cross cause, (although he had obtained an order to warrant it,) because the modus set up in the cross Bill, was different from that insisted upon in his answer to the original Bill (*g*).

Depositions, &c., in another suit.

With respect to evidence in cross causes, the general rule is, that where a matter is put in issue by the original cause, and witnesses are examined to it, the defendant cannot read the depositions of the witnesses, to the same matters which have been taken after publication has passed in the original cause (*h*), although depositions of witnesses in the cross cause, to matters not put in issue by the original cause, may be read, nothwithstanding they have been taken after publication passed in the original cause (*i*). Where, however, neither party has examined witnesses in the original cause, the depositions of witnesses taken in the cross suit, to matters put in issue by the original cause, may be read (*k*).

Cannot be read unless persons against whom they are read were a party or privy.

In order to entitle a party to read the depositions taken in another cause, it is necessary, that the person against whom they are offered in evidence, or the person under whom he claims, should have been a party to such other cause (*l*). Where the person against whom the evidence was offered, was neither a party to such other cause, nor privy to a person who was a party, the depositions taken in that cause cannot be read. Thus where a father is tenant for life only, depositions taken in a cause to which he was a party, cannot be read against his son who claims as tenant in tail (*m*).

The rule with regard to reading depositions in another suit, appears to be the same as that with respect to reading verdicts at common law, viz., '*that nobody can take a benefit by it, who had not been prejudiced by it had it gone contrary* (*n*).' Thus it has been held, that if A. prefers his Bill against B., and B.

(*g*) Christian v. Wrenn, Bunb. 321.

(*h*) Welford v. Beazley, 3 Atk. 501; Taylor v Obee, 3 Pri. 83.

(*i*) Welford v. Beazley, ubi supra.

(*k*) Ibid.

(*l*) Mackworth v. Penrose, 1 Dick. 50; Eade v. Lingood, 1 Atk. 204; Humphreys v. Pensam, 1 M. & C. 580.

(*m*) Peterborough v. Norfolk, Prec in Cha. 212, Coke v. Fountain, 1 Vern. 413.

(*n*) Gilbert on Evid. 28; Bull. N. P. 232.

Depositions, &c., in another suit.

exhibits his Bill against A. and C., in relation to the same matter, and a trial at law is directed, C. cannot give in evidence the depositions in the cause between A. and B., but the trial must be entirely as of a new cause (*o*). This rule appears to be somewhat at variance with what is stated in *Coke* v. *Fountain* (*p*) to be a common one, viz., that where one legatee has brought his Bill against an executor, and proved assets, and afterwards another legatee brings his Bill, that the last named legatee should have the benefit of the depositions in the former suit, though he was not a party to it; but it is to be observed, that the case of the legatee is different from the case of a plaintiff in ordinary circumstances; for although the legatee was not actually a party to the original suit, yet he was so virtually; his interest in the first suit having been represented by the executor. In fact, in the case of the legatee, the suit is in *pari materia;* and, with respect to the subject in dispute, the plaintiff in the second suit stands in the same situation, with regard to the defendant, as the plaintiff in the first. The same principle appears to have been acted upon in other cases, besides those of legatees; thus in *Terwit* v. *Gresham* (*q*), depositions taken in an old cause, where the same matters were under examination and in issue, were permitted to be read, although the plaintiff and those under whom he claimed were not parties to the former cause, inasmuch as the *terre tenants* of the same lands were then parties; and so even at law, in the case of tithes, an answer to a Bill filed in the Court of Exchequer, in a suit instituted by a vicar against the rector and others, owners of the lands, was evidence in an action for tithes, by a succeeding rector, against the owners or occupiers of the same lands (*r*). In like manner, in a late case, before Sir Anthony Hart, in Ireland (*s*), depositions which had

Secus in the case of a Bill by a legatee after decree for another.

(*o*) Rushworth v. Countess of Pembroke, Hardr. 472; for the reason, why a verdict is not evidence for or against a person who was not a party to it, vide Phil. & Amos, 514.

(*p*) 1 Vern. 413.

(*q*) 1 Cha. Ca. 73.

(*r*) Lady Dartmouth v. Roberts, 16 East, 336; vide etiam Travis v. Challenor, 3 Gwil. 1237; Ashby v. Power, ib. 1239; Benson v. Olive, 2 Gwil. 701; Earl of Sussex v. Temple, 1 Ld. Raym. 360.

(*s*) Byrne v. Frere, 2 Moll. 157.

been taken in a suit by one tenant in common against another were admitted in evidence, in a suit by another tenant in common, against the same defendant (*t*). In such cases, however, it must be proved, that the depositions are touching the same land or tithe (*u*).

Depositions &c. in another suit.

Rule as between co-defendants.

It seems not to be important, what character the individual, against whom the depositions in the former suit are offered, filled in that suit, whether that of plaintiff or defendant, provided he had, in such character, an opportunity of cross-examining the witness. If he was a party to the first suit as a co-defendant, and becomes a plaintiff in the second suit, making his co-defendant in the first suit a defendant, he may, if such co-defendant sets up the same defence that he did in the original suit, read the evidence taken in that suit against such co-defendant. Thus, where the creditors of a testator filed their Bill against the residuary legatees, and also against a purchaser from the testator, praying to have their debts paid, and the conveyances, alleged to have been executed by the testator to the purchaser, set aside for fraud, &c., and obtained a decree accordingly; and afterwards the residuary legatees filed another Bill against the purchaser, praying for an account of the residue and to set aside the conveyances,—upon the question arising, whether the depositions taken in the former cause as to the fraud, &c., in obtaining the conveyances, could be read in the second cause, for the legatees against the purchasers, who were co-defendants in the former cause, the Lord Keeper, (Wright,) and the Master of the Rolls were of opinion, that as there was the same question and the same defence in both the causes, the depositions ought to be read (*x*).

And so where a Bill is filed for the performance of trusts, and settling the rights of all parties, upon which a decree is made, not only the decree, as we have seen, but the depositions taken in that suit may be read in a subsequent suit as between persons who were co-defendants in the first suit;—whe-

(*t*) Bishop of Lincoln v. Ellis, Bunb. 110.

(*u*) Benson v. Olive, Bunb. 284.

(*x*) Nevil v. Johnson, 2 Vern. 447.

Depositions in another suit.

ther such depositions are conclusive or not is another matter (*y*).

Besides the instances above stated, there are other exceptions to the rule which requires that depositions, &c. should be admitted as evidence only between the original parties to the suit and their privies; these occur principally in cases of hearsay evidence or reputation, as in questions of custom, or of the right to tolls, &c. The nature of these exceptions is fully explained in Mr. Phillips's Treatise on the Law of Evidence (*z*); and it is only necessary here to add, that the same exceptions will, in most cases, apply to the rule before laid down as to the reading of depositions in a cause in equity where the person for or against whom they are offered in evidence, was neither a party nor a privy.

Not necessary that witnesses should be dead

It may be stated here, that where the depositions of witnesses in another suit, are offered to be read at the hearing against persons who were parties to such other suit, or those claiming under them, it does not appear to be necessary that the witnesses, whose depositions were offered to be read, should be proved to be dead. This appears to have been the effect of the determination of the House of Lords in the *City of London* v. *Perkins* (*a*), and of Sir John Leach, V. C., in *Williams* v. *Broadhead* (*b*). In a subsequent case, however, (*Carrington* v. *Carnock* (*c*),) Sir L. Shadwell, V. C., seems to have entertained a different opinion from that expressed by Sir J. Leach, in *Williams* v. *Broadhead;* and it is to be remarked, that at Law, the depositions of a witness, taken in a suit in Chancery, cannot be read if the witness is alive, even though he is unable to attend by reason of sickness (*d*). It is, however, to be observed, that the personal examination in Court, to which a witness is subjected at Law, renders it much more important that he should be examined again, than it is in Equity, where the depositions are taken in all cases in secret.

Rule where the Bill has been dismissed.

Some doubt seems to have been, at one time, entertained whether the depositions of witnesses, taken in a cause where

(*y*) Poulterers' Company v. Askew, 2 Ves. 89, 90.
(*z*) Phil. & Amos, 575.
(*a*) 3 Bro. P. C. 602.
(*b*) 1 Sim. 151.
(*c*) 2 Sim. 567.
(*d*) Phil. & Amos on Evid. 577.

the Bill had been subsequently dismissed, could be read at the hearing of another cause, and the rule appears to have been laid down, that if the dismissal was upon merits, yet evidence of the facts which have been proved in the cause may be used as evidence of the same facts in another cause between the same parties (*e*); but where a cause has been dismissed, not upon merits, but upon the ground of irregularity, (as, for instance, because it comes on by revivor, where it ought to have come on by original Bill,) so that regularly there was no cause in Court, and consequently no proofs properly taken, such proofs cannot be used (*f*). If, however, upon a Bill to perpetuate testimony, the cause should be set down for hearing, and the Bill dismissed because it ought not to have been set down, the plaintiff may, notwithstanding the dismissal, have the benefit of the depositions (*g*).

Depositions in another suit.

An order for leave to read, at the hearing, the depositions or proceedings in another cause, is granted upon motion or petition at the Rolls without notice, and must be served upon the adverse party, who may, if there is any irregularity in it, or in the mode in which it has been obtained, apply by motion to discharge it. As, however, it is possible that the irregularity of such an order may not appear till it is acted upon at the hearing, when it would be too late to discharge it, the order is always made with a '*saving of just exceptions*' (*h*), the effect of which is to leave it open to the party against whom the evidence is offered, to make any objection to the reading of evidence under it which the nature of the case will admit in the same manner that he might have done had no such order been made.

Order to read depositions, &c.

It is to be observed, that, in *Coke* v. *Fountain* (*i*), the defendant applied, by motion, to be at liberty to read, at the hearing, depositions made in another cause where the plaintiff's father was a party, but the Court refused to make any other order than the common one, *saving just exceptions*.

—not made without 'saving just exceptions.'

It may be remarked here, that, as at law, depositions are

(*e*) Lubiere v. Genou, 2 Ves. 579.

(*f*) Backhouse v. Middleton, 1 Cha. Ca. 173-175; 3 Cha. Rep. 37, 9 Freem. 132.

(*g*) Hall v. Hoddesdon, 2 P. Wms. 162. Vide etiam Vaughan v. Fitzgerald, 1 Sch. and Lef. 316.

(*h*) Hand. 114, 115.

(*i*) 1 Vern. 413.

Depositions, &c. in another suit.

evidence as an admission against a party to the suit, or for the purpose of contradicting a witness, without proof of the Bill and answer (*k*); so it is presumed, that, in equity, depositions in a former suit may be read for the same purpose without an order.

—obtained by one party may be used by the other.

By the general orders of the Court it is directed, that, where either party, plaintiff or defendant, obtains an order to use the depositions of witnesses taken in another cause, the adverse party may likewise use the same without further order, unless he be, upon special reason shewn to the Court by the party first desiring the same, inhibited, *by the same order*, so to do (*l*).

Office-copies may be used,

As the Court will give credit to its own records and proceedings, so it will give credit to office-copies of such records or proceedings, signed by the proper officer having the custody of them; though, as we have seen, other Courts will not give credit to such copies, without proof that they have been examined and compared with the original. When, therefore, proceedings or depositions in another cause, in the Court of Chancery, are ordered to be read as evidence at the hearing, it will be sufficient to produce the office-copies of them; such office-copies, however, must be signed by the proper officer, otherwise they cannot be read (*m*).

—if properly signed.

If, however, at the hearing of a cause, it should be found that the office-copy of a proceeding which one party relied upon as evidence, has not been properly signed, the Court will allow the cause to stand over for the purpose of procuring the proper signature; and where an information came on for hearing, and the relators failed in their proof, because the office-copy of an answer, proposed to be read by them, was not signed by the proper officer, and the Master of the Rolls thereupon dismissed the information with costs; the dismissal was, upon appeal reversed (*n*).

Deeds, &c., thirty years old.

The documents which have been before enumerated, as requiring no evidence to prove them, are all, either in a greater

(*k*) Phil. & Amos on Evid. 620.
(*l*) Beames's Ord. 194.
(*m*) Attorney-General v. Milward, 1 Cox, 437.
(*n*) Ibid.

or less degree, public documents: private documents which are thirty years old from the time of their date, also prove themselves (*o*). This rule applies, generally, to deeds concerning lands, and to bonds, receipts, letters, and all other writings, the execution of which need not be proved, provided they have been so acted upon, or brought from such a place, as to afford a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty (*p*). Lord Chief Baron Gilbert, however, upon this point, says, that 'if possession hath not gone along with a deed, some account ought to be given of the deed, because the presumption fails, where there is no possession' (*q*); and he adds a caution, that, 'if there is any blemish in an ancient deed, it ought to be regularly proved, or where it imports a fraud; as where a man conveys a reversion to one, and afterwards conveys it to another' (*r*).

Deeds, &c., thirty years old.

The rule of computing the thirty years from the date of a deed is equally applicable to a will. Some doubt appears formerly to have been entertained on this point, on the ground that deeds take effect from their execution, but wills from the death of the testator (*s*). In *Rancliff* v. *Parkins* (*t*), Lord Eldon observes, 'that, in a Court of Law, a will thirty years old, if possession has gone under it, and sometimes without possession, (but always with possession,) if the signing be sufficiently recorded, proves itself; but if the signing be not sufficiently recorded, it would be a question, whether the age proves its validity; and then possession under the will, and claiming and dealing with the property as if it had passed under the will, are cogent reasons for proving the due signing of the will, though it be not recorded.'

Rule applicable to wills,

It appears to be doubted, whether the seal of a Court or corporation is within the rule as to thirty years; and in *Rex* v. *the Inhabitants of Bathwick* (*u*), Lord Tenterden said, 'that it

—but not seals of corporations.

(*o*) Phil. & Amos on Evid. 650.

(*p*) Ibid. 652. Vide etiam, as to letters, Fenwick v. Reed, Mad. & Geld. 8.

(*q*) Gilb. on Evid. 102.

(*r*) Ibid.

(*s*) Phil. & Amos on Evid. 652; M'Kenire v. Fraser, 9 Ves. 5.

(*t*) 6 Dow. P. C. 202.

(*u*) 2 Barn. & Adol. 648.

Deeds, &c., thirty years old.

might be argued that it was not within the principle of the rule, because, although the witnesses to a private deed, or persons acquainted with a private seal, may be supposed to be dead, or not capable of being accounted for, after such a lapse of time; yet the seals of Courts and of corporations, being of a permanent character, may be proved by persons at any distance of time from the date of the instrument to which they are affixed (x).'

Sect. II.

Of Documentary Evidence—which does not prove itself.

Proof of documents generally the same as at law.

Having pointed out the species of documentary proofs which may be used in Courts of Equity, without the aid of any other evidence to authenticate them, or which, in other words, 'prove themselves'; the next subject for consideration is the nature of the proofs requisite to enable a party to make use of documents which do not come under the same description. This branch of the subject, however, is far too extensive for the present treatise, and must, therefore, be passed over with the simple observation, that, except in a few instances, which will be pointed out, the rules which affect it are the same as those which are applicable to the same description of subjects in Courts of Common Law, and may be found by referring to any of the many excellent treatises on Evidence which have been published.

Rules in equity with respect to wills of real estate.

With respect to the cases in which different rules prevail, in Courts of Equity, from those which are adopted at law, the most important are those of wills devising real estates. At law, it is sufficient to examine one witness to prove a will, if he can prove the due execution of it, unless it is impeached (a); but, in equity, in order to prove the will against the heir, all

Where suit is to establish it.

(x) Phil. & Amos on Evid. 652.

(a) Seton on Decrees, cites Peake's Evid. 401.

Wills of real estate.

the witnesses must be examined (*b*). In *Powell* v. *Cleaver* (*c*), Lord Thurlow seems to have doubted the rule; but, in *Bootle* v. *Blundell* (*d*), Lord Eldon affirmed it.

This rule, although general, admits of necessary exceptions, and perhaps does not apply where the will is not wholly, but only partially, in question (*e*). The rule also does not apply in cases where one of the witnesses is dead (*f*), or is abroad; in which cases proof of his handwriting has been held sufficient (*g*). In like manner, where a witness has become insane (*h*), or has not been heard of for many years, and cannot be found, his evidence has been dispensed with (*i*).

It is also necessary, in equity, where the object of the suit is to establish a will against the heir, to prove the sanity of the testator (*k*).

We have before seen (*l*), that, in some cases, where the proof of a will is defective, liberty will be given to exhibit interrogatories to supply the defect. It may here also be added, that where the proof, though not formal, is satisfactory to the Court, the trusts of the will will be directed to be carried into execution without declaring the will well proved (*m*).

Where suit is not to establish it.

Although, where a will is to be established against an heir, the general rule, in equity, is, that it must be proved by all the witnesses, or by producing evidence of their death and handwriting, &c.; the same rule does not apply when proof of the will is required for other purposes, *i. e.* merely to enable it to be read as a legal instrument; in such cases, one witness to prove it is

(*b*) Bootle v. Blundell, 19 Ves. 505; Coop. 137, S. C. Vide etiam Ogle v. Cook, 1 Ves. 177. Townshend v. Ives, 1 Wils. 216. Bullen v. Michel, 2 Pri. 491.

(*c*) 2 Bro. C. C. 504.

(*d*) Ubi supra.

(*e*) Per Lord Eldon, in Bootle v. Blundell, 19 Ves. 505.

(*f*) Ibid.

(*g*) Lord Carrington v. Payne, 5 Ves. 411. Vide etiam Billing v. Brooksbank, cited 19 Ves. 505; Fitzherbert v. Fitzherbert, 4 Bro. C. C. 231, and Grayson v. Atkinson, 2 Ves. 454, where it was held, that a commission should have been sent to examine the witness abroad; but the rule in Carrington v. Payne seems to be the one now acted upon. Seton on Decrees, 83.

(*h*) Bernett v. Taylor, 9 Ves. 381.

(*i*) James v. Parnell, Turn. & Russ. 417; M'Kenire v. Fraser, 9 Ves. 5.

(*k*) Harris v. Ingledew, 3 P. Wms. 93; Wallis v. Hodgeson, 2 Atk. 56.

(*l*) Ante, p. 416.

(*m*) Seton on Decrees, 83; Binfield v. Lambert, 1 Dick. 337; Bird v. Butler, ib. notis; Fitzherbert v. Fitzherbert, 4 Bro. C. C. 231; Wood v. Stane, 8 Pri. 615. For the cases in which the Court will declare a will well proved in the absence of the heir, vide ante, v. 1, p. 326.

Wills of real estate.

sufficient (*n*). So, also, if the object of the suit is only to appoint new trustees to execute the trust of the will, one witness will be all that is required (*o*).

Right of heir to an issue.

It is to be remarked, that however clearly a will may be proved upon the interrogatories, the heir at law may still claim, as a right, an issue *devisavit vel non* (*p*); and that the rule that all the witnesses must be examined, extends also to the trial of the issue before the jury (*q*). In *Tatham* v. *Wright* (*r*), however, where the Bill was not filed by the devisee to establish the will, but by the heir to set it aside, the defendant called one witness, and produced the other two, offering them to the plaintiff to call and examine them, which he declined, not wishing to make them his own witnesses; upon a motion for a new trial, which was twice argued, once before Sir John Leach, M. R., and secondly before Lord Brougham, C., assisted by Sir N. Tindal, L. C. J., and Lord Lyndhurst, C. B., the cause was held to have been sufficiently tried.

Production of original will, how obtained.

Whilst we are upon the subject of proving wills, it is as well to mention a practice, which appears to be peculiar to Courts of Equity, for compelling the production of the original wills, where they have been deposited in the registry of an Ecclesiastical Court. In all other cases, where an original record, or instrument in the nature of a record, is required to be produced in the Court of Chancery, the practice is, to procure the attendance of the proper officer, (in whose custody it is deposited,) with the original record or instrument required; and the same may be done with respect to wills. The Court, however, will, it seems, in the case of wills, make an order upon the officer of the Ecclesiastical Court to deliver the original will to the Solicitor in the cause, upon his giving security, (to be approved by the judge of the Court,) to return it safe and undefaced within a particular time (*s*). In *Fauquier* v. *Tynte* (*t*),

(*n*) Concannon v. Cruise, 2 Moll. 332.

(*o*) Wood v. Stane, 8 Pri. 613.

(*p*) Pemberton v. Pemberton, 11 Ves. 53.

(*q*) Bootle v. Blundell, 19 Ves. 505; Coop. 137, S. C.

(*r*) 2 Russ. & M. 1.

(*s*) Morse v. Roach, 2 Strange, 961; 1 Dick. 65, S. C.; Frederic v. Aynscombe, 1 Atk. 627; Pierce v. Watkin, 2 Dick. 485; Lake v. Causfield, 3 Bro. C. C. 263; Forder v. Wade, 4 Bro. C. C. 476; Hodson v. ——, 6 Ves. 135; Ford v. ——, ibid. 802. Vide etiam 2 Equity Draftsman, 362.

(*t*) 7 Ves. 2[illegible]2.

Lord Eldon seemed at a loss to account for this deviation from the ordinary course, (which he thought might be inoperative if the officer of the Ecclesiastical Court refused to obey the order,) and declined to extend it to any other case than that of a will.

Wills of real estate.

Another distinction which exists between the practice of Courts of Common Law and of Equity in matters of evidence, relates to proving the contents of documents, in the hands of the adverse party, by secondary evidence. The grounds upon which secondary evidence of the contents of written documents is admitted, are in both jurisdictions the same; namely, that the party has not the means of producing them, because they are either lost or destroyed, or in the possession or power of the adverse party. At law, where it is not known till the time of trial what evidence will be offered on either side, a party, in order to entitle himself to give secondary evidence of the contents of a written document, on the ground of its being in the possession of his adversary, ought to give him notice to produce it; for otherwise, *non constat*, that the best evidence might not be had. But even at law, when, from the nature of the proceeding, the party must know that the contents of a written instrument in his possession will come into question, it is not necessary to give any notice for its production; and, therefore, in an action of trover for a deed (*u*), or upon an indictment for stealing a bill of exchange (*x*), it has been held, that, without previous notice, parol evidence may be given of the contents of the instrument which is the foundation of the proceeding. The same exception to the general rule appears to be equally applicable in Courts of Equity; for there it is held, that when, either from the pleadings or depositions, a party is apprized that it is the intention of the opposite party to make use of secondary evidence of the contents of a document in his possession, such secondary evidence may be used at the hearing without serving the party in whose possession it is with notice to produce it. This point was much considered by Sir W. Grant, M. R., in *Wood* v. *Strickland* (*y*), where a witness, who had been examined on the part of the defendant, deposed to the

Rule with regard to *secondary* evidence of contents.

Notice to produce,

—not required where party is apprized of the intention to prove the contents.

(*u*) How v. Hall, 14 East. 274.
(*x*) Aickle's case, 1 Leach, 330.
(*y*) 2 Mer. 461.

Notice to produce.

contents of a certain letter which had been written by the plaintiff to the witness, which the witness stated that he had himself subsequently returned to the plaintiff, who immediately threw it into the fire and destroyed it. At the hearing, an objection was taken, on the part of the plaintiff, to the admissibility of this evidence, on the ground that there was no proof of the letter being lost or destroyed, nor of any notice given to the plaintiff to produce it; but the objection was overruled by the Master of the Rolls, on the ground that the plaintiff must have seen, by the depositions, that the evidence of the case, set up by the Bill, consisted of certain written communications which had taken place on the subject of the suit, and that it was impossible, therefore, that he could have been taken by surprise, or could not be prepared to produce any letter that might be in his possession. His Honour observed, that, 'as the kind of notice given before a trial was not necessary, so neither was there any mode by which proof of it could be regularly given at the hearing.' The same opinion as to the practice in equity appears to have been entertained by Lord Manners in Ireland (z). It is right, however, to state, that, in *Hawkesworth* v. *Dewsnap* (a), the present Vice-Chancellor came to a decision which was contrary to that in *Wood* v. *Strickland* (b); and that, in *Stulz* v. *Stulz* (c), he referred to his own decision in *Hawkesworth* v. *Dewsnap*, though he expressed himself willing to have the point again argued, in order that the practice might be settled. The point, however, was not argued, the objection having been waived. And it is to be remarked, that, in a recent case, his Honour held, that if a plaintiff has proved a document which is in the custody of a defendant, the defendant, in whose custody it is, is bound to produce it at the hearing, although he has not been served with an order to that effect (d).

Production of document where it may convict the party of a crime.

It may be mentioned, with reference to this subject, that, in *Parkhurst* v. *Lowten* (e), Lord Eldon appears to have thought, that when a defendant admitted a deed to be in his possession,

(z) Lyne v. Lockwood, 2 Moll. 321.

(a) Cited 5 Sim. 460.

(b) Ubi supra.

(c) 5 Sim. 460.

(d) Wheat v. Graham, 7 Sim. 61.

(e) 2 Swanst. 213.

but declined to produce it, on the ground that it might convict him of simony, or any other criminal offence, secondary evidence of its contents may be received. The question, however, still remains to be decided.

Written documents.

Where written documents, which are not admitted, do not prove themselves, they must be proved by witnesses, in the same manner as documents of a similar description are proved in trials at law. The witnesses, however, for this purpose are examined either by the examiner or by commissioners, in the same way that witnesses are usually examined in causes in equity, except in certain cases, in which the Court will permit them to be examined *vivâ voce* at the hearing.

In what manner proved; —by examination of witnesses before the examiner, &c.;

Sect. III.

Of proving Exhibits vivâ voce *at the Hearing.*

An examination *vivâ voce* at the hearing is admitted where written documents, essential to the justice of the cause, have been neglected to be proved before publication has passed in the suit, or where the plaintiff, finding sufficient matter confessed in the defendant's answer to ground a decree upon, proceeds to a hearing of the cause upon Bill and answer only (*a*). The defendant's answer, in such case, being taken as true, no examination of witnesses is requisite; the proof, therefore, of the documents referred to in the pleadings, when such proof is necessary, must be by witnesses *vivâ voce* at the hearing (*b*).

—or *vivâ voce* at the hearing. In what cases after publication. Upon Bill and answer.

Amongst the documents which may be proved *vivâ voce* at the hearing of a cause, may be classed 'all ancient records of endowments and institutions, whether they are offered to be proved as original instruments, or as they are found, collected, and recorded in ancient register-books deposited in the registries of the archbishops and bishops, or of the deans and chap-

What exhibits may be proved *vivâ voce.* Ancient records and writings.

(*a*) Hind. 369.

(*b*) Ibid. Vide etiam Fielder v. Cage, Prac. Reg. 219.

What may be proved *vivâ voce.*

ters of collegiate churches, or of the ecclesiastical courts, bulls of the popes, records from the Bodleian, Harleian, and Museum libraries, or from any of the public libraries belonging to the two universities, or from the library at Lambeth; all or any of which ancient documents must be produced by those persons in whose immediate custody they are, who must be sworn to identify the particular document or record produced in his custody before the same can be read (*c*).'

Copies of records signed by proper officer.

So in like manner may be proved as exhibits, office-copies of records (*d*) from any of the Courts at Westminster, or from the Ecclesiastical Courts of Canterbury, York, &c., or of grants or enrolments from the rolls or other records deposited there or in the Tower, or of records or proceedings from courts of inferior jurisdiction in England, as those of the counties palatine of Chester, Lancaster, or Durham, or of the Courts of Great Session in Wales, or of the Courts of the two universities, or of the city of London, or of the Cinque Ports (*e*).

Deeds, letters, and vouchers.

Deeds, bonds, or other instruments which require proof of their due execution by a subscribing witness or witnesses, or promissory notes, bills of exchange, letters, or receipts, of which proof must be made of the handwriting of the persons writing or subscribing the same, are all considered as exhibits which may be proved *vivâ voce.*

Nothing that admits of cross-examination;

—or that requires any evidence besides that of signature;

It is to be observed, that, with the exception of documents coming out of the hand of a public officer having the care of such documents, (which are proved by the mere examination of the officer to that fact,) no exhibit can be proved *vivâ voce* at the hearing, that requires more than the proof of the execution, or of handwriting to substantiate it; if it be any thing that admits of cross-examination or that requires any evidence be-

(*c*) 2 Fowl. Ex. Pr. 157.

(*d*) The office-copies here mentioned mean the copies of those records of which it is the duty of proper officers appointed by the law to furnish copies for general use, and does not mean those copies which it is the duty of the officer of the Court to make for the convenience of suitors in that Court, such as the ordinary office-copies of pleadings and depositions in the Court of Chancery and Exchequer, which, although they are admissible in the Courts to which the officer belongs, are not, as we have seen, admissible in other Courts without further proof of their accuracy. Ante, p. 424; Phil. & Amos on Evid. 614.

(*e*) Ibid.

sides that of handwriting, it cannot be received (*f*). This rule is strictly adhered to; and in many cases, where an instrument which, *primâ facie* appears to be an exhibit, requires more formal proof, it cannot be received as one. Thus, in the case of *Earl Pomfret* v. *Lord Windsor* (*g*), Lord Hardwicke refused to admit certain receipts to be proved *vivâ voce*, although ordinarily they might be taken as exhibits; because, in order to make them evidence of the fact they were intended to substantiate, a further fact must have been proved, which the other side would have had a right to controvert and to cross-examine upon. So where a deed was offered in evidence, the subscribing witnesses to which were dead, and witnesses were produced, at the hearing, to prove the handwriting of such witnesses, they were not allowed to be examined, because something more, viz., the death of the witnesses, was necessary to be proved (*h*). For the same reason, a will of real estate cannot be proved *vivâ voce*, because, besides the mere execution of the will, the sanity of the testator must be established (*i*). The Vice-Chancellor, Sir L. Shadwell, has also ruled, that where a power is required to be exercised by a deed executed in the presence of, and attested by witnesses, the deed by which the power is exercised cannot be proved *vivâ voce* at the hearing of the cause (*k*). So where a book, in which the collector of a former rector had kept accounts of the receipt of tithes, was offered to be proved *vivâ voce*, it was rejected, because, besides proving the handwriting, it would be necessary to prove that it came out of the proper custody, and that the writer was the collector of the tithes (*l*).

What may be proved.

If a document is impeached by the answer of a defendant, it cannot be proved *vivâ voce*, on the part of the plaintiff, against such defendant. Thus where the answer of one of the defendants in a cause, insisted that a covenant

—or the execution of it is impeached by the answer.

(*f*) Lake v. Skinner, 1 Jac. & W. 9, 15. It seems, however, that the Court will, upon the suggestion of Counsel, put questions to a witness who is examined *vivâ voce*. Vide Turner v. Burleigh, 17 Ves. 354.

(*g*) 2 Ves. 472

(*h*) Bloxton v. Drewit, Prec. in Cha 64.

(*i*) Harris v. Ingledew, 3 P. Wms. 93; Niblett v. Daniell, Bunb. 310; 2 Fowl. Ex. Pr. 188.

(*k*) Brace v. Blick, 7 Sim. 619.

(*l*) Lake v. Skinner, 1 Jac. & W. 9.

What may be proved.

was fraudulently inserted in a deed, &c., Lord Lyndhurst refused to admit such deed to be proved *vivâ voce* against that defendant, although he held, that it might have been so proved against the other defendant, who had not impeached its authenticity (*m*). So where a Bill was filed for the payment of an annuity, the circumstances under which the annuity-deed was executed being disputed by the parties, the plaintiff was not allowed to prove the deed *vivâ voce* as an exhibit; but leave was given to file interrogatories for that purpose (*n*).

Secus, where the validity is in question.

It is only, however, where the *execution* or the *authenticity* of a deed is impeached, that it cannot be proved *vivâ voce;* if *the validity* of it only is disputed, it may be so proved (*o*).

It is to be observed, that the refusing a party liberty to prove exhibits *vivâ voce* at the hearing of a cause in equity, where it can be done, is irregular and unprecedented (*p*).

Order for.

It is, however, necessary, in order to authorize the examination of a witness *vivâ voce* at the hearing of a cause, that the party intending to make use of the exhibits should previously obtain an order for that purpose. This order is never made on the application of the contrary party, but may be obtained, by the party requiring it, by motion in Court without notice, or by petition to the Master of the Rolls (*q*); and it is often granted during the hearing of the cause (*r*); in which case the cause will be ordered to stand over for the purpose of enabling the order to be served and acted upon.

Must be on application of the party intending to use the exhibits.

Service of.

The order, when drawn up, must describe the exhibits to be proved; and it is always made as of course, '*saving all just exceptions*' (*s*).

Examination of witness.

The order being drawn up, passed, and entered, a copy thereof must be served, in the usual manner, upon the adverse Clerk in Court, or his agent, two days previous to the hearing of the cause (*t*).

(*m*) Barfield v. Kelly, 4 Russ. 355.

(*n*) Mabur v. Hobbs, 1 Younge & Coll. 585.

(*o*) Attorney-General v. Pearson, 7 Sim. 303.

(*p*) Edgworth v. Swift, 4 Bro. P. C. 658.

(*q*) Graves v. Budgel, 1 Atk. 444.

(*r*) Bank v. Farques, Amb. 145.

(*s*) Hind. 370.

(*t*) Ibid.

When the cause is called on, and the exhibit required to be proved, the original order and the exhibit described therein, together with the witness to prove the same, must be produced to the Registrar in Court, who will administer the usual oath; the examination, also, of the witness, as to the execution, &c., is performed by the registrar (*u*).

Process to compel attendance.

It may not be unnecessary to mention that no documents but those mentioned or described in the order can be thus proved at the hearing; and as the order saves just exceptions, all objections which can be taken to the admissibility of the document as evidence may, then, be urged by the opposing party.

Confined to the document mentioned.

Saving just exceptions.

The attendance of an unwilling witness to prove an exhibit at the hearing, may be enforced by process of *subpœna*, which is to be obtained in the manner which will be hereafter pointed out with regard to ordinary subpœnas *ad testificandum;* and must be in the following form:—

Subpœna to testify *vivâ voce;*

Victoria, &c.—To —— Greeting. We command you, [and every of you,] *that laying all other matters aside, and notwithstanding any excuse, you personally be and appear before our Lord High Chancellor,* [or before his Honour the Master of the Rolls or the Vice Chancellor,] *at such time and place, as the bearer hereof shall by notice in writing appoint, to testify the truth according to your knowledge, in a certain suit now depending in our High Court of Chancery, wherein ——* [and others or another] *are plaintiffs, and ——* [and others or another] *are defendants, on the part of the ——;* [in case of a subpœna *duces tecum*, add, and that you then and there bring with you and produce, &c.] *And hereof fail not at your peril.* Witness &c. (*x*).

—duces tecum.

A *subpœna* of this nature requires the same personal service as a subpœna to testify in other cases; and every circumstance to be observed in serving an ordinary subpœna, *ad testificandum,* such as tender or payment of sufficient money, to pay the expences of the witness, &c., must be observed in serving this (*y*).

Service of.

The party who serves the subpœna must, at the same time that he serves it, deliver to the witness a notice in writing

Notice of time for attendance.

(*u*) Hind. 371.
(*x*) Ord. 1833. Appx.
(*y*) Vide post, part 3, sect. 4.

Process.

appointing the time and place for the witnesses' attendance (z); with respect to which, it is to be observed, that the time must be a reasonable time before the day fixed for the notice (a).

Production of exhibits after proof.

It may be noticed, in this place, that where one party has proved written documents in a cause, the other side has no right, upon that ground, to call for an inspection of them before the hearing; because, a party can have no right to see the strength of his adversary's case, or the evidence of his title before hearing (b), and, therefore, where a defendant, on petition at the Rolls, had obtained an order to inspect a deed which had been proved by the plaintiff, and which was referred to by the deposition of one of his witnesses, Lord Hardwicke, on motion, discharged the order (c). And so where a defendant had proved a deed, which was referred to in the depositions, Lord Hardwicke refused to make an order, on behalf of the plaintiff, to compel the defendant to produce it (d).

Part III.—Of Oral Testimony.

Sect. I.—*Who may be witnesses.*

Nature of oral testimony.

II. *Oral or unwritten testimony,* is that which is given by, or taken down from, the mouth of living witnesses.

All persons are competent to be witnesses in equity, who are capable of being witnesses in trials at law.

Different grounds of incompetence.

With respect to the cases in which a witness is deemed incompetent to give any evidence at all, they are stated to be fourfold, viz.; 1st, where the witness labours under a defect

(z) Ord. 1831. Appx.

(a) Hind. 372.

(b) For the cases in which a party may have the production of documents in the hands of his adversary, vide post, Motions to produce Documents.

(c) Davers v. Davers, 2 P. Wms. 410.

(d) Hodson v. Earl of Warrington, 3 P. Wms. 35.

of understanding; 2nd, where he refuses to take an oath, or, from defect of religious opinion, does not acknowledge its sanction; 3d, where his character is infamous, in consequence of a conviction of certain crimes; and, 4th, where he is interested in the matter in issue (*a*). It is not intended, in the present treatise, to enter into the three first causes of disqualification, further than as they may be incidentally noticed in the ensuing sections. The distinctions arising upon them, are in fact common to Courts, both of Law and of Equity, and may be found by referring to the general treatises upon the subject of evidence. With respect to the 4th class of disqualifications, viz., those which arise from the interest of the witness in the matter in issue; they present some features in which the rules of this Court, with regard to them, necessarily differ from those of the Courts of ordinary jurisdiction, and are, therefore, more properly the subject of notice in the present chapter.

Of incompetence.

The persons who have the most immediate and obvious interest in the event of a cause, are the parties to that particular cause; and they are, therefore, in general, incompetent witnesses. The incompetence, however, of witnesses from interest in the subject-matter, is not confined to persons who are parties to the record; an individual is equally incompetent to be a witness, if he be interested in the result of the case, whether he be a party or not. In the following pages, therefore, the rules of the Court, as they affect the admission or rejection of witnesses on the ground of interest, will be considered with reference, 1st, to those who are parties to the suit; and, 2nd, to those who are not parties.

By reason of interest.

1. It has frequently been supposed, that in the rules which regulate the admission or rejection of the evidence of parties to the record, Courts of Equity differ materially from Courts of Law; it will be found, however, upon investigation, that the differences which exist, are to be discovered, principally, in the practical application of general principles in the several jurisdictions, and not in the principles themselves.

Where witnesses are parties to the record.

(*a*) Phil. & Amos on Evid. 3.

Parties to the record.
—incompetent where interested.

The incompetency of the parties to the record in actions at law to give evidence in the suit, appears to be founded upon the sole ground of their being interested in the event (*b*). No case can be found, in which the testimony of a witness has been rejected at law, upon the objection, in the abstract, that he was a party to the suit; on the contrary, many may be produced, in which parties to the suit have been brought forward, and the only inquiry has been, whether the party called, was interested or not, and the admission or rejection of the witness has depended upon this inquiry (*c*).

Secus where not interested.

In general, however, in actions at law, the parties to the record are interested either in the question at issue or in the costs, and it therefore seldom happens that they are competent to give evidence (*d*); and this has given rise to the general notion, that, at law, a party to the record is inadmissible as a witness, and that there is a distinction in this respect between the rules of Law and Equity. But, even at Law, whenever a person tendered as a witness, has no interest in the event of a suit, he will be competent, although he is a party to the record (*e*). And the rule in equity is the same, since it only admits the testimony of those parties who are not interested in the event of the suit; or at least of that part of it to which the evidence, they are called upon to give, applies.

Co-plaintiff or *prochein amy* not competent.

In Equity, therefore, as well as at Law, those parties only are excluded from giving evidence, who are directly interested in the result of the cause. Thus, a co-plaintiff is considered, in every case, an incompetent witness, both at law and in equity, by reason of his liabilty to the costs of the suit (*f*); and upon the same principle, a *prochein amy* suing for an infant, is incompetent to be witness for the plaintiff in both jurisdictions (*g*).

Plaintiff who has become bankrupt.

It is to be observed, that the rule which prohibits a plaintiff

(*b*) 1 Phil. & Amos, 47.

(*c*) Per Tindâl, L. C. J., in Worrall v. Jones, 7 Bing 398, 399.

(*d*) Vide Phil. & Amos, 51.

(*e*) Ibid.

(*f*) Casey v. Beachfield, 1 Eq. Ca. Ab. 225; Phillips v. Duke of Buckingham, 1 Vern. 230; Mayor and Alderman of Colchester v. 1 P. Wms. 595; Hewatson v. Tookey, 2 Dick. 799; Benson v. Chester, Jac. 577.

(*g*) Ante, v. 1, ; and Phil. & Amos, 48.

Parties to the record.

from being examined as a witness on behalf of his co-plaintiff, operates as long as the plaintiff's name continues on the record; and, therefore, it was held, that a plaintiff who had become bankrupt, could not be a witness on behalf of his assignees who had filed a supplemental Bill, although he had obtained his certificate, and had released, because he was still liable to the costs of the original Bill (*h*). If, therefore, a plaintiff is desirous of having the evidence of his co-plaintiff at the hearing of the cause, he must, (unless the defendant will consent to his being examined,) move for leave to strike out his name as co-plaintiff, and to make him a defendant by amendment; which, as we have seen, will be permitted even without the consent of the defendant, upon the plaintiff, who moves, giving security for the costs already incurred (*i*). So also, in the case of a *prochein amy*, if his evidence is considered necessary for the plaintiff, the proper course is, to obtain leave to strike out his name as next friend, and to substitute another, which will be granted upon the like terms of giving security for the costs already incurred (*k*). A plaintiff, however, cannot obtain leave to examine either a co-plaintiff or a *prochein amy* as a witness, merely on giving security for costs (*l*); without either changing the character in which he appears upon the record, or striking him out altogether.

Plaintiff may be examined for defendant,

But, although a plaintiff in a cause cannot be a witness for his co-plaintiff, he may, with his own consent, be examined by a defendant as to points in which he is not interested (*m*). The consent of the plaintiff, however, to be examined is absolutely necessary, and the decision of Lord Northington in *Troughton* v. *Getley* (*n*), who appears to have made an imperative order for the examination of a plaintiff, at the instance of a defendant, is stated by the reporter to have been doubted by

—but not without his own consent.

(*h*) Hewatson v. Tookey, 2 Dick. 799.

(*i*) Ante, vol. 1, p. 510. Vide etiam Ewer v. Atkinson, 2 Cox, 393; Motteux v. Mackreth, 1 Ves. Jr. 142; Lloyd v. Makeam, 6 Ves. 145.

(*k*) Ante, v. 1, p. ; Head v. Head, 3 Atk. 511; Witts v. Campbell, 12 Ves. 493.

(*l*) Benson v. Chester, Jac. 577.

(*m*) Walker v Wingfield, 15 Ves. 178; Armiter v. Swanton, 1 Amb. 393. Sed vide Mr. Blunt's note to his edition of Mr. Ambler's Reports.

(*n*) 1 Dick. 382.

Parties to the record.

the whole bar, and to have been exploded by Lord Thurlow in *Hewatson* v. *Tookey* (o).

Prochein amy.

The rule which prohibits a defendant from examining a plaintiff as a witness, without his consent, does not extend to prevent his so examining a *prochein amy*, because otherwise the plaintiff, by making a material witness a *prochein amy*, might rob the other side of the benefit of his testimony; and accordingly where a defendant had obtained an order at the Rolls for liberty to examine a plaintiff, and also a *prochein amy*, as witnesses in the cause, upon a motion being made to discharge the order, it was only discharged as to the plaintiff, and not as to the *prochein amy* (p).

Plaintiff may examine a defendant, —as to points in which he has no interest.

Although a plaintiff cannot examine a co-plaintiff, he may examine a defendant as a witness on his own behalf as to points in which the defendant is not interested; as, where a plaintiff makes a person a defendant for form's sake, it is a motion of course to examine such defendant as a witness in the cause (q). Thus a trustee, who has the legal interest in the estate, but is merely a nominal party in every other respect, may be a good witness for the plaintiff.

Difference between a trustee and an executor or administrator,

In this respect there is a material difference between a mere trustee and an executor or administrator; a mere trustee may be a good witness for his *cestui qui trust*, but an *executor* or *administrator* cannot be a witness to increase the assets, although he has no personal interest in them, because he is answerable for a *devastavit*, and liable to be sued by the creditors and to answer the costs (r). This, however, is not the case with an administrator *durante minore ætate*, after his administration is determined, for, as he is not liable to be called to an account by any person but the executor, he may be examined as a witness, on behalf of the executor, against a third person (s).

—or an administrator *durante minore ætate.*

Rule as to interest applies to adverse interest.

The rule that a defendant, who is interested in a suit,

(o) 2 Dick. 799. Sed vide Whately v. Smith, ib. 650. Vide etiam Fereday v. Wightwick, 4 Russ. 114.

(p) Bird v. Owen, Mos. 312.

(q) Man v. Ward, 2 Atk. 228.

(r) Ibid.; Croft v. Pyke, 3 P. Wms. 181; Mabank v. Metcalf, 3 Atk. 95; Fotherby v. Pate, ib. 603.

(s) Fotherby v. Pate, ubi supra.

Parties to the record.

cannot be examined as a witness, applies, not solely to cases where the interest of the plaintiff and of the defendant examined are the same, but to those in which they are adverse, and in such cases it will not only prevail to prevent his evidence being read (*t*), but will also prevent a plaintiff from having a decree against such defendant (*u*). *For the rule of this Court is, 'that whenever you examine a defendant as a witness, you cannot pray an adverse decree against him, because that would be charging him on his own evidence, which if you do would be a great temptation to defendants to forswear themselves'* (*x*). Therefore, if, by any possibility, a decree can be had against the defendant, he cannot be examined. Upon this ground where a title was set up to an estate, by a Bill, and a person was made defendant who disclaimed all right, and was not brought to a hearing, the Court said you shall not read his evidence as a proof of your own right to the prejudice of another defendant (*y*). The reason of this is that the plaintiff might, notwithstanding the disclaimer, have brought the defendant, who had disclaimed, to a hearing, and have obtained a decree against him (*z*). He ought, before he examined him as a witness, to have dismissed the Bill as against him, or to have struck out his name by amendment. And so where a Bill was brought against two defendants charging them with fraud, and one of them, (*Friend*,) denied the fraud and charged it upon the other, on which the plaintiff did not reply to *Friend*'s answer, but examined him as a witness to prove the fraud in the other defendant; upon the question being raised, at the hearing, whether the evidence of *Friend* should be read, the Lord Chancellor, (Lord Hardwicke,) was of opinion that it could not be received 'for that the defendant's answer must be taken to be true as between him and the plaintiff, and consequently there could be no decree against him; yet, as between the plaintiff and the other defendant, the Bill must be taken as true, and by that it appeared that *Friend* was equally guilty

No decree can be made against a defendant who has been examined by plaintiff.

(*t*) Nightingale v. Dodd, Amb. 583.

(*u*) Meadbury v. Eisdale, cited in Blunt's Amb. 817 n. (1).

(*x*) Carter v. Hawley, cited in Blunt's Amb. 584. Vide etiam Weymouth v. Boyer, 1 Ves. Jun. 417.

(*y*) Hill v. Adams, 2 Atk. 39.

(*z*) Ante, p. 236.

Parties to the record.

and liable to make satisfaction:——That though the plaintiff had not replied to the answer, yet he might have done so at any time before publication; so that the defendant was, at the time of his examination, under a bias.—The plaintiff ought to have amended the Bill by striking him out as a defendant, and then he would have been a good witness'(*a*).

Rule adopted for the benefit of co-defendants and not of defendant himself,

The reason of the rule above laid down is, that a plaintiff shall not compel a defendant to assist, and in the same cause act adversely against him (*b*). And it is to be observed, that it is not for the sake of the defendant himself, that the rule has been adopted, as he has a better protection from giving evidence against himself in the power he has of demurring to the interrogatory. It is for the sake of the other parties. The causes of exception can only come from the other defendants (*c*).

—does not apply where defendant has no beneficial interest,

The rule, however, does not apply to cases where the party who has been examined has no beneficial interest in resisting the decree; and in this respect the rules of this Court differ from that of Law, because in Equity a plaintiff must frequently make parties whom he must necessarily examine in the cause as witnesses, (such as mere trustees, &c.,) and, notwithstanding, pray a decree against them; for though they may have the legal estate in them, yet they are not materially interested (*d*).

—or where he submits to a decree against him.

Therefore, where a Bill was filed by an annuitant against the trustees of certain funds, upon which the annuity was charged, and the plaintiff examined, as a witness, one of the trustees, who was a defendant, but who submitted to a decree; upon its being objected at the hearing, that as one of the trustees had been examined as a witness, no decree could be taken against him, for an account of the trust fund come to his hands, and that, as no account could be obtained against him directly, no account could indirectly and by means of his evidence be decreed against his co-trustess: Lord Lyndhurst, L. C. B., overruled the objection, on the ground, that as the

(*a*) Meadbury v. Eisdale, Blunt's Amb. Appx. 817, n.(1). Vide etiam Meadbury v. Isdall, 9 Mod. 438, S. C.

(*b*) Nightingale v. Dodd, Amb. 584.

(*c*) Nightingale v. Dodd, ubi supra.

(*d*) Carter v. Hawley, cited Amb. 583.

defendant had submitted to the account, he was a mere stakeholder, and had no interest whatever in the result, and therefore came within the principle laid down by Lord Hardwicke, in *Carter* v. *Hawley*, above referred to.

Parties to the record.

It is to be remarked, that in his judgment, the Lord Chief Baron relied upon the fact of the defendant, who had been examined, submitting to the decree; had it been otherwise, no decree could have been made in the cause, for it appears to be a rule of the Court, *that if a plaintiff by examining a defendant precludes himself from obtaining a decree against him, he also precludes himself from obtaining relief against the others, if, in order to such relief, a decree against the defendant examined is necessary.* Thus it has been held, that where a plaintiff by examining, as a witness, a defendant who was primarily liable, had precluded himself from obtaining relief against such defendant, he could not have relief against another defendant, who was only secondarily liable, *i. e.* liable in case a decree had been made against the first (*e*).

Where no decree can be made against a defendant, —none can be made against the others, if a decree against the defendant examined is necessary to complete relief, —as where a defendant examined is primarily liable,

The case would be the same if the defendant examined be one of several liable to account, as in the case of *Hulton* v. *Sandys* (*f*), in which all the defendants were equally liable to account and contribution; no decree could have been made if the defendant who had been examined in the cause, had objected on that ground to the account prayed against him.

—or is one of several accounting parties.

This question was discussed in *Massey* v. *Massey* (*g*), before Sir Anthony Hart, L. C., in Ireland. There Mr. Massey, who had been examined as a witness, was a material defendant in the cause: it was contended, that as the plaintiff had examined him as a witness, he would have no decree in the cause, and that the Bill must be dismissed with costs; and the Lord Chancellor appears to have considered the rule laid down to be a valid one, but as the plaintiff was an infant, and it appeared that the examination of Mr. Massey was unnecessary, (the whole of the plaintiff's case having been admitted by the answer,) his Lordship, to save the expense of a new suit, made a

(*e*) Thompson v. Harrison, 1 Cox, 346. Vide etiam Nightingale v. Dodd, Amb. 583; Bernall v. Ld. Donegal, 3 Dow. P. C. 133; Gould v. O'Keefe, 1 Beatie, 356.

(*f*) 1 Younge, 602. Vide etiam Meadbury v. Isdall, 9 Mod. 438.

(*g*) 1 Beattie, 353.

Parties to the record.

decree for the plaintiff upon the Bill and answer, directing, however, that the examination of the defendant should be suppressed, and the defendants indemnified against the costs of it.

If defendant is only partially interested, he may be examined as to the points in which he has no interest.

It is to be observed, that the rule which prohibits a defendant from being examined, or his evidence from being read on behalf of the plaintiff in the cause, is confined to those matters in which the defendant is interested either in procuring or resisting a decree, because *there cannot be a decree either for a man or against him upon his own evidence*(*h*). If a defendant is not interested in the whole of the matters embraced in the suit, he may be examined as to those in which he has no interest, and a decree may be made against him upon the rest(*i*), the Court taking the distinction that the interest must relate to the matters to which he is examined(*k*).

Defendant cannot be examined after his answer has been replied to,

or if he denies the plaintiff's case.

A plaintiff, who intends to examine a defendant as a witness, should not reply to his answer; if he does so, it will be considered as an intimation that he intends to seek a decree against him, which will prevent his reading the depositions at the hearing(*l*). And even if he does not reply to the answer, yet, if the defendant has denied the plaintiff's case, the plaintiff will be equally precluded from using his evidence at the hearing; thus in *Meadbury* v. *Eisdale*(*m*), before referred to, where the Bill was brought against two defendants charging them with fraud, and one of the defendants denied the fraud, and charged it on the other, Lord Hardwicke would not allow the depositions of the defendant who had denied the fraud, to be read against the other, notwithstanding the plaintiff had not replied to the answer, because although he had not replied at the time of the examination he might have done so at any time before publication, so that the defendant at the time of his examination might have been under a bias.

(*h*) Per Mr. Mitford, (Lord Redesdale,) argued in Weymouth v. Boyer, 1 Ves. Jr. 420.

(*i*) Nightingale v. Dodd, Amb. 83; Mos. S. C. 228.

(*k*) Murray v. Shadwell, 2 V. & B. 403.

(*l*) Winter v. Kent, 2 Dick. 595.

(*m*) Serjeant Hill's MSS. cited Blunt's Ambler, 817, n. 1. Vide Meadbury v. Isdall, 9 Mod. 438, S. C. semble.

Parties to the record.

If answer has been replied to, replication may be withdrawn or amended.

If a plaintiff has replied to the answer of a defendant, whom he afterwards thinks it necessary to examine, he may apply to the Court to withdraw his replication, or to have it amended by striking out the name of such defendant (*o*), and even without taking this step the Court of Exchequer has permitted an executor, who was not beneficially interested, but whose answer had been replied to, to be examined for the purpose of proving the execution of documents to which he was a witness (*p*).

Rule as to costs where plaintiff examines a defendant.

Where a plaintiff examines a defendant as a witness, he will be decreed to pay him his costs of the suit. Whether the plaintiff will be allowed to recover these costs from the other defendants must depend upon the circumstances of the case. Thus in *Weymouth* v. *Boyer* (*q*), where a party was properly made a defendant, but was examined as a witness for the plaintiff, and a decree was made against the other defendant with costs, the Court ordered the costs of the defendant who had been examined, to be paid to him by the plaintiff, and directed the plaintiff to have them over against the other defendant; but in *Hervey* v. *Tabbutt* (*r*), where the defendant who was examined had, on a former occasion, colluded with the plaintiff with regard to the subject of the suit, the plaintiff was ordered to pay him his costs, but was not allowed to recover those costs over against the other defendants.

Defendant may examine a co-defendant,

It is a rule at law, that when the plaintiff has made many persons defendants, and the principal defendant calls one of the co-defendants to be a witness, if the plaintiff cannot give some material evidence against him, he is allowed to be a good witness, or else it would be in the power of the plaintiff to take off all the defendant's witnesses by naming them defendants in the action (*s*). And this rule has been adopted by Courts of Equity, which permit the examination of a defendant by a co-defendant in all cases where the defendant to be examined is not

(*o*) Hardcastle v. Shafto, Scacc. 2 Fowl. Ex. Pr. 85.

(*p*) Crookhall, v. Smith, Scacc. ibid. 86.

(*q*) 1 Ves. Jun. 416.

(*r*) 1 Jac. & W. 197.

(*s*) Piddock v. Brown, 3 P. Wms. 288.

Parties to the record. —where he is not interested.

interested in the result (*t*). If a defendant is interested in the result, his depositions cannot be read on behalf of a co-defendant any more than they can, under similar circumstances, be read for a plaintiff.

Extent of interest which will prevent a co-defendant from being a witness.

With regard to the nature of the interest which will prevent a defendant being a competent witness for a co-defendant, the principles of Equity are the same as those at Law, and it may be laid down as a rule *that whenever a decree can be made against a defendant upon the subject as to which he is examined, his evidence in favor of a co-defendant will be inadmissible*(*u*), and, therefore, where an agreement was entered into between the witness, (who was a defendant,) and the plaintiff, for the sale of the plaintiff's estate to another defendant, and the witness was bound in a penalty for non-performance, his depositions were not allowed to be read as evidence on behalf of the other defendant (*x*). So where a defendant may by any possibility be liable to costs, this is always a reason for refusing his evidence, because he is interested so far as to be swearing to excuse himself (*y*); therefore, where one defendant is charged with fraud, his depositions cannot be read for another, as it may tend to excuse him with regard to his own costs (*z*). It is to be remarked, however, that this rule extends only to cases where the defendant examined has been made a party, *because he has a direct interest;* where he is merely made a party, as an Attorney, or trustee, the objection will not go to his competency but only to his credibility (*a*).

—must be a beneficial interest,

When it is said, that the circumstance of a defendant being liable to have a decree made against him, will preclude his depositions from being read as evidence for another defendant, the rule must be understood as being subject to the same limitations as have been before laid down with regard to the examination of a defendant by a plaintiff, viz., that the decree to which he is liable must be an adverse decree, or it will not preclude his evidence. Where a defendant is a mere formal

(*t*) Piddock v. Brown, 3 P. Wms. 288.

(*u*) Dixon v. Parker, 2 Ves. 219.

(*x*) Ibid.

(*y*) Barrett v. Gore, 3 Atk. 402.

(*z*) Eade v. Lingood, 1 Atk. 204; Scroggs v. Scroggs, Blunt's Amb. 815; Bridgman v. Green, 2 Ves. 628.

(*a*) Bridgman v. Green, ubi supra.

party, such as a bare trustee having the legal estate, he will be a good witness as well for a co-defendant as for the plaintiff (*c*).

Parties to the record.

— will not apply to cases where he is only partially interested.

It has been before stated, with reference to the examination of a defendant on the part of a plaintiff (*d*), that the rule which prohibits a defendant from such examination, is confined to those matters in which he is interested, and that if he is not interested in all the matters embraced in the suit he may be examined as to those in which he has no interest; the same rule applies to the examination of a defendant by a co-defendant. Indeed it is much more important to the ends of justice that it should do so; otherwise, as a plaintiff, by joining persons as defendants in a suit, in which he has cause of suit against one as to one subject, and against another as to a different subject, but having no cause against them jointly, might, unless the Court permitted one defendant to examine the other, by this sort of mechanism, deprive one of the benefit of the other's evidence (*e*). Upon this ground it is that where a defendant disclaims, he may, as we have seen, be examined as a witness on behalf of the other defendants, although he cannot be examined for the plaintiff unless his name is struck out of the record (*f*).

Where party is disinterested at the time of examination, but afterwards becomes interested, his depositions may be read.

It sometimes happens that a person who has been examined as a witness in a cause, and was then a competent witness, afterwards becomes interested in the subject-matter, and is made a party to the suit before the hearing; in such cases the Court will permit his evidence, taken at the time when he was disinterested, to be read in his own favour. Thus where a witness had been examined on the part of the plaintiff, who claimed under a first will, to prove, that, at the time of the execution of a second will, the testator had been imposed upon by the party preparing it, and afterwards the plaintiff in the cause died, having devised her interest under the first will to the witness, who thereupon filed a Bill, in the nature of a Bill of revivor, to have the benefit of the proceedings in the suit,

(*c*) Vide ante, p. 450; *secus*, where he is an executor or administrator.

(*d*) Ante, p. 454.

(*e*) Murray v. Shadwell, 2 V. & B. 405.

(*f*) Vide ante, pp 236. 237. Sed vide Windham v. Lord Richardson, 2 Cha. Ca. 214 n.

Parties to the record.

his depositions were allowed to be read in his own behalf; because when he was examined he was a good witness and disinterested (g). And so where a person who had been examined as a witness for the plaintiffs, was afterwards made a defendant to the suit, an objection to reading his evidence at the hearing was overruled by Sir W. Grant, M. R. (h). In like manner where a witness had been examined *de bene esse*, afterwards became interested, and was made a party, his depositions *de bene esse*, were read at the hearing (hh).

In fact, what the Courts require is, that the party examined as a witness should be disinterested at the time of the examination; if he had no interest at that time, it is of no importance whether he has acquired an interest since, or had one before, which, at the time of his examination, he was divested of; and upon this principle it is that Courts will permit a witness to be examined, who, having had an interest in the subject-matter, has divested himself of it by a release; he must, however, have executed the release before his examination, otherwise his depositions cannot be read (i).

Order for leave to examine a party;

It has been before stated, that little, if any, distinction exists between the rules of Law and of Equity, with regard to the examination of parties to the record as witnesses in the cause; in fact, the distinction, if any exists, does not extend to the principle of the rule, but is confined to the practice of the Courts with regard to the manner in which such examination is to take place. At law, if a party to the record is not interested in the suit, he is tendered for examination in the same manner as any other witness; but, in equity, it is necessary to have the sanction of a previous order before such examination can be taken.

—how obtained.

An order for leave to examine a party to the record may be obtained either upon motion in Court or by petition at the

(g) Goss v. Tracey 1 P. Wms. 288. Vide etiam Haws v. Hand, 2 Atk. 615; Glynn v. Bank of England, 2 Ves. 43.

(h) Cope v. Parry, 2 Jac. & W. 538; sed vide contra, Prac. Reg. 420.

(hh) Brown v. Greenly, 2 Dick. 504.

(i) Anon. 2 Atk. 15.

Rolls. In either case a previous notice is unnecessary, as the order will be granted as a matter of course, '*saving just exceptions*,' upon the suggestion that *the party to be examined has no interest in the cause, or in the matters in question in the cause* (*k*).

Parties to the record.

It seems to have been formerly the practice of the Court to consider, before making the order for the examination of a party, whether the party was interested or not (*l*); and in a case before Lord Eldon (*m*), such an order was refused, his Lordship observing, that 'the Court, in making this order for the examination of a party, proceeds upon the allegation that he has no interest; and, if it perceives an interest, will not make the order, even upon the supposition that the interest may be released before examination; much less will it make the parties incur the expense of having the objection taken at the hearing, upon which objection, if taken upon a motion, the Court would not have made the order.' But although the Court will, if it perceives that the suggestion of no interest, upon which the order is made, is not true in fact, refuse to make the order, the general practice is, to grant the order as a matter of course, leaving it to the other party to make the objection that there are just exceptions, at the hearing, when the deposition is offered to be read (*n*); and where a motion was made to discharge an order for the examination of a defendant, on the ground that it appeared, by his answer, that he had an interest, Lord Thurlow refused to discharge the order, because it might happen that the defendant had released since his answer was put in (*o*).

In what cases refused.

Generally granted as of course.

It may be observed here, that, although the order for the examination of a party is made upon the suggestion that the party to be examined has no interest in the matters in question in the cause, the circumstance of such an allegation being contained in the order will not prevent the depositions of a party, who has an interest in some only of the subjects of the

The suggestion of no interest in the matters in question,

—will not prevent depositions being taken

(*k*) Murray v. Shadwell, 2 V. & B. 401.

(*l*) Vide Hand's Prac. 96, 97; 1 Harr. Ed. Newl. 275.

(*m*) Anon. 18 Ves. 517. Vide Hewatson v. Tookey, 2 Dick. 799.

(*n*) Lee v. Atkinson, 2 Cox. 413.

(*o*) 1 Harr. Ed. Newl. 275, S. C.

Parties to the record.

suit, from being read as to those points in which he is not interested; and that where it is intended to examine a party so circumstanced, it is not necessary to limit the order to permit his examination to those matters only in which he has no interest. This point was discussed in *Murray* v. *Shadwell* (*p*), where the petition, upon which the order was made, instead of the usual allegation of no interest, contained an allegation, that, though the defendant proposed to be examined, was interested in the matters in question in the cause, he was in no wise interested in the points to which the party seeking the order was desirous of examining him, and upon a motion to discharge the order, as being contrary to the practice of the Court, Lord Eldon and Sir William Grant expressed their opinion, that the usual suggestion that the defendant to be examined is not interested in the matters in question in the cause, in whatever terms expressed, must mean that the party is not interested in the point to which he is to be examined, and that, under it, a defendant may be examined as to any matter in which he is not interested; they, therefore, considered it better to adhere to the old form, unless precedents of this new mode of allegation and recital could be produced.

where party is interested in part of the matters only;

—provided he is not examined as to points in which he is interested.

Service of order.

The order for the examination of a party having been obtained, passed, and entered, must be served on the adverse Clerk in Court (*q*), and produced at the execution of the commission, or at the examiner's office, or wherever the examination is to be taken, when the party attends to be examined. Without the production of the order, a party cannot be examined; for it is by virtue of the order and the authority thereby given them by the Court, that the commissioners or examiners are empowered to examine the party; and without the actual production of the original order, regularly passed and entered, they must not presume to enter upon the examination (*r*).

Production of order to commissioners or examiners.

If both parties examine a party without an order, neither can object.

It may be remarked in this place, that if both sides examine a witness without an order, neither can afterwards object to the evidence, as each, by examining him, has allowed him to

(*p*) 2 V. & B. 401.

(*q*) Hind 256; 1 Harr. Ed. Newl. 275. Vide etiam Mulvany v. Dillon, 1 Ball. & B. 409.

(*r*) Hind. 357.

be a good witness (s). A cross-examination, however, by the other party will not be a waiver of the objection to his competence (t).

Parties to the record.

II. With respect to the *rejection of evidence by witnesses who are not parties to the suit*, on the ground that they are interested in the result, the principles upon which Courts of Equity proceed are the same as those of the ordinary tribunals.

Disqualification from interest where witness is not a party.

The interest which may disqualify a person, not a party, from giving evidence at law, has been divided into *direct* and *indirect* (u). The rule, however, of Courts of Equity, which has been before alluded to, as requiring the presence of all persons who have a direct interest in the subject-matter, necessary upon the record, renders it a matter of rare occurrence that the depositions of persons coming under the first of these distinctions should be the subject of discussion, unless where they have been examined, as parties to the suit, in the manner before pointed out. Still, however, cases may occur, in which a direct interest in the subject may belong to a person who is not a party, which will disqualify him from giving evidence. Thus a residuary legatee or next of kin are incompetent as witnesses in a suit by or against an executor or administrator, where the effect of his evidence would be to increase the fund; and upon the same principle, a bankrupt or a person who has taken the benefit of the Act for the Relief of Insolvent Debtors, or a creditor of a bankrupt or insolvent debtor, is an incompetent witness in a suit for his assignees. So in suits by or against corporations, individual members are incompetent, where they have an interest, as members of the corporation, in the subject-matter (x). In all these cases, the

Direct.

(s) Prac. Reg. 419.
(t) Moorehouse v. De Passow, 19 Ves. 435; Coop. 300. S. C. vide post.
(u) Phil. and Amos, 72.
(x) It is not intended here to enumerate all the cases in which a witness is disqualified in consequence of the direct nature of his interest; they will be found particularly pointed out in Phillips and Amos on Evidence, p. 86 & seq. The object of the author is merely to point out the distinction between a direct and an indirect interest.

Disqualification from interest.

individual, although not in a situation to be a party to the record, has a direct interest in the result of the suit, which, unless released, or in some other manner got rid of, will render him an incompetent witness.

Indirect.

But a direct and immediate benefit from the result of the suit was not formerly the only species of interest which rendered a witness incompetent to give evidence; for, until the passing of a recent act (y), which has effected a material alteration in the law in this respect, witnesses who were neither *parties to the record*, nor had any *direct* interest in the event of the suit, were often rendered incompetent, by reason of an indirect interest in the record with reference to some subsequent suit for or against the witness himself, in which the decision obtained upon the testimony of the witness might be made use of as evidence in favour of his right in such suit. Thus if the issue in a suit were on a right of common, which depended on a custom pervading the whole manor, a person claiming a right under this custom was incompetent to give evidence on behalf of the party to the particular suit, who relied on the existence of the custom; for although, in this case, the witness would gain no immediate benefit from the termination of the particular suit, the record in that suit would be evidence in a subsequent action by or against the witness for the trial of the same right (z). So also in an action in which an issue arose concerning the existence of a custom to take a certain toll from fishermen frequenting a particular cove, it was decided that a fisherman, who was not a party to the action, but who frequented the same cove, and would have been liable to pay toll under the custom, was an incompetent witness for the purpose of disproving the existence of the custom; for here, also, although no immediate gain or loss could result to the witness from the immediate event of the particular suit, yet if a subsequent action was brought against himself for not paying toll, the record of the verdict in the former action would be evidence for or against the witness in the subsequent action (a).

(y) 3 & 4 W. 4, c. 42, ss. 26 & 27.

(z) Phil. & Amos on Evid. 77.

(a) Lord Falmouth v. George, 5 Bing. 286.

Disqualification from interest. —where indirect done away with by Stat. 3 & 4 W. 4, c. 42, ss. 26, 27.

Such was the general state of the law, before the passing of the Statute 3 & 4 Wm. 4, c. 42, ss. 26 and 27, the effect of which has been to remove all those more remote disqualifications, and to reduce all questions on the incompetency of witnesses as being interested, to the inquiry, whether or not the witness has any direct interest in the event of the particular suit (*b*).

Provisions of the Statute.

By that Statute, sect. 26, it is provided, in order to render the rejection of witnesses on the ground of interest less frequent, '*that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action on which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case a verdict or judgment in that action in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him; nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him;*' and by sect. 27 it is further enacted, that '*the name of every witness objected to as incompetent, on the ground that such verdict or judgment would be admissible in evidence for or against him, shall, at the trial, be endorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the Court, at the request of either party, and shall be afterwards entered on the record of the judgment, and such indorsement or entry shall be sufficient evidence that such witness was examined in any subsequent proceeding in which the verdict or judgment shall be offered in evidence.*

Applicable to Courts of Equity.

The effect of this enactment is to remove the objection to the competency of the witness, by removing the interest out of which the objection arises; and it has been decided by the Vice-Chancellor, Sir L. Shadwell, that its provisions ought to be adopted by Courts of Equity (*c*).

(*b*) Phil. & Amos on Evid. 77.

(*c*) Wheat v. Graham, 7 Sim. 62.

Disqualification from interest.

But not to cases of direct interest.

The act, however, removes one, only, of the grounds of incompetency from interest which before existed, and it does not apply to any *direct* interest which a witness may have in the subject-matter, which may still be a valid ground of objection to the evidence of such witness.

Entry in decree.

In *Wheat* v. *Graham*(c), which has been before referred to, the Vice-Chancellor directed the entry, which the act requires to be made in the record of the judgment, to be made in the decree.

Objections to credit only do not preclude evidence.

It is material to notice, that, before the passing of the above act, the direct and immediate advantage which a witness, not a party to the record, might derive to himself from the event of the suit itself, and the indirect advantage which he might have from setting up the judgment in such suit in support of his own claims in a future proceeding, were the only grounds upon which a witness became incompetent from interest; since the statute, the first only of these grounds remains; all other objections on the ground of a supposed interest affect *the credit of the witness* only, and not his competency(d), and therefore do not preclude his evidence.

Cross-examination of a witness not a waiver of objection on account of interest;

Before quitting the subject of the competency of witnesses, it is right to mention a point in which the rules of Courts of Equity differ from those of the Common Law Courts, and that is, upon the effect of cross-examination in waiving an objection to competency. At law, a party waives any objection to the competence of a witness by pursuing his cross-examination after the witness appears to be interested. Formerly, the inquiry whether a witness was interested could only be made upon the *voir dire;* now if the interest comes out at any period, his evidence is rejected. In Chancery, there is no such opportunity of inquiring into the competence of the witness by the *voir dire;* and, until the depositions are published, it cannot be known whether the witness has or has not admitted the fact

(d) Phil. & Amos, 75. (c) 7 Sim. 62.

Disqualification from Interest.

upon which the objection arises. The *waiver* at law arises from pursuing the examination after the objection to the competence of the witness is known, but it is difficult to say how an unknown objection can be waived. The witness may deny all interest in the cause, and upon the supposition that he is competent, it may be very material to the other party to cross-examine him. Under these circumstances, the principle leads to this conclusion, that, in equity, the cross-examination of a witness in utter ignorance of his having given an answer to an interrogatory shewing that he has an interest in the cause, cannot amount to a waiver of the objection to his competence (*e*). It may be supposed, from the preceding observations, which are those of Sir William Grant, that the rule there laid down, that the cross-examination of a witness would not have the effect of waiving an objection to his competence, is applicable only to cases in which the party cross-examining is, at the time, ignorant of the interest of the witness; this, however, is not the case, for, even where it was apparent on the Bill itself that the witness was interested, (in fact, the witness was a defendant, but had disclaimed,) the circumstance that the principal defendant had cross-examined him on the merits, was held by Sir John Leach, M. R., to be no waiver of the objection (*f*).

—even where interest appears on the record;

—and witness is a defendant.

It is right, however, that a party intending to object to the evidence of a witness whom he has cross-examined, should do so at the earliest opportunity that offers itself; he should, therefore, take the objection immediately upon the deposition being offered to be read; if he permits the evidence to be read, he waives the objection to the competency of the witness (*g*).

(*e*) Per Sir William Grant, M. R., in Moorehouse v. De Passou, 19 Ves. 435; Coop. Ch. Rep. 390, S. C.

(*f*) Harrison v. Courtauld, 1 R. & M. 428. Vide etiam Pigott v. Croxall, ibid. notis, and Ellis v. Deane, 3 Moll 48, in which Sir Anthony Hart, L. C., however, held; that a party cross-examining a witness, who is a defendant, cannot object to the witness as incompetent, when the other side attempts to read the evidence to the cross-interrogatory, although he did not think the effect of such cross-examination would be to let in the evidence in chief. Ib. 62; 1 Beat. 5, S. C.

(*g*) Scott v. Fenwick, Gwill. 1255.

Sect. II.

Of Interrogatories.

General rule to examine upon interrogatories.

The general mode of examining of witnesses in equity is by interrogatories in writing, exhibited by the party, plaintiff or defendant, or directed by the Court to be proposed to or asked of the witnesses in a cause, touching the merits thereof or some incident therein.

We have seen before (*a*), that, for the purpose of proving exhibits, a *vivâ voce* examination is sometimes permitted, and a few cases have occurred in which the same method of examination has been adopted, either by consent of the parties (*b*), or by the direction of the judge, for the purpose of informing the mind of the Court, upon matters not documentary (*c*); but the general rule of the Court is, as has been stated, to examine all witnesses upon interrogatories, which are administered to the witnesses either by the regular Examiners of the Court, or through the medium of Commissioners specially appointed for the purpose (*cc*).

Nature of interrogatories.

These interrogatories are questions in writing, adapted to sustain the case made by the party exhibiting them (*d*). They are termed *original*, when exhibited on the part of the person who produces the witness; or *cross* interrogatories, if filed on behalf of the adverse party, to examine a witness produced on the other side (*e*).

Original.

Cross.

Must be drawn and signed by Counsel.

By an order of the Court, dated the 29th of April, 1686 (*f*), it is directed, that no interrogatories shall be exhibited for the examination of witnesses in any cause in this Court, whether in Court, in the Examiner's Office, or by commission in the country, before such interrogatories shall be either drawn or perused by Counsel, (after due consideration had of the plead-

(*a*) Ante, p. 441.

(*b*) Vide Holles v. Carr, 3 Swanst. 638; Rep. temp. Finch. 261; 2 Mod 86; 2 Freem. 3, S. C.

(*c*) Vide Bishop v. Church, 2 Ves. 105; Gage v. Hunt r, 1 Dick. 49; Moore v. Aylet, 2 Dick. 641.

(*cc*) Where a witness is served with a subpœna to produce deeds, &c., it is not necessary that there should be a written interrogatory, as to his having them in his possession, although a demand to produce them, does in fact amount to an interrogatory to that effect. Bradshaw v. Bradshaw, 1 R. & M. 358.

(*d*) Hind. 317.

(*e*) Ibid.

(*f*) Beames's Ord. 272, repeated 13th July, 1699, ibid. 311.

ings,) and signed by them; and all Counsel are to take care that no interrogatories do slightly pass their hands contrary to the true intent and meaning of the order, least they incur the displeasure of the Court therein; and it is also directed, that all depositions taken contrary thereto shall be suppressed.

Leading.

Interrogatories should be short and pertinent, and necessarily they must not be leading. If they are leading, the deposition taken thereon will be suppressed; and so it will be where the interrogatories are too particular, and point to one side of the question more than the other (*g*).

Must be pertinent, —and not leading.

Leading questions are such as instruct a witness how to answer on material points, such as, '*Did you not see or do such a thing?*' or which, embodying a material fact, admit of an answer by a simple negative or affirmative, though the question does not suggest which (*h*). 'Such questions, as well as those which fall more directly under the denomination of leading questions, are objectionable, because the evidence elicited by them is presented to the Court, which is to judge of the effect of it, not as it would be if it were the unassisted testimony of the witness, but in the form, and with the colouring, that are prompted by professional skill and a previous knowledge of the case which it is desired to prove. If such a mode of proof were admitted, there would not be the same probability that a witness would state the whole transaction, and part only might be elicited: the chance, too, of detecting discrepancies in perjured or mistaken testimony would be diminished, nor are those objections removed by the power of cross-examination, which, as it often must be conducted without previous knowledge of the answers which the witness will give, is not a counterbalance to the facility afforded of presenting a selected portion of the evidence in chief' (*i*).

Leading interrogatories, what.

It is to be observed, that, in order to render an interrogatory objectionable, on the ground of its being leading, it must relate to some material point in the cause. 'Questions which are intended merely as introductory, and which, whether an-

Must relate to some material point.

(*g*) 1 Harr. Ed. Newl 259.
(*h*) Ibid. Vide etiam Phil. & Amos, 886.
(*i*) Phil. & Amos, 887

Leading.

swered in the affirmative or negative, would not be conclusive on any of the points in the cause, are not liable to the objection of leading. If it were not allowed to approach the points in issue by such questions, the examination of witnesses would run to an immoderate length. For example, if two defendants are charged as partners, a witness may be properly asked, whether the one defendant has interfered in the business of the other' (*k*).

Rules with regard to leading;

It is difficult, however, to suggest any rules, in the abstract, with regard to what will or will not be considered as a leading question, as much, in every case, must depend upon the peculiar circumstances attending it; nevertheless the avoiding such questions as may be considered leading, is a point very important to be attended to in the framing of interrogatories, as the consequences of them may be a motion to suppress the evidence taken upon them, whereby the party will, in all probability, be deprived of an important part of the evidence upon which he intends to rely. Indeed, it seems that, where interrogatories are obviously leading, the Court will, without any motion being made to suppress the deposition, think it a good ground to reject the evidence taken upon it at the hearing (*l*). It may be observed, however, that where depositions are offered in evidence in a trial at law, they may be read notwithstanding the interrogatories on which they were taken are leading; —the other side ought to have applied to the Court in which they were taken to have them suppressed (*ll*).

—do not apply to cross-interrogatories.

Cross-interrogatories must not apply to new facts.

Cross-interrogatories are not subject to the same objections, on account of their leading the witness, as interrogatories for examination in chief; care must be taken, however, in framing them not to adapt them to the proof of new facts which it is not likely the party examining in chief will attempt to substantiate by his evidence; for, although the adverse party may cross-examine as to the points upon which a witness has been examined in chief, he cannot make use of the same process to prove a different fact (*m*). If, therefore, there should be any

(*k*) Phil. & Amos, 887.

(*l*) Delves v. Lord Bagot, 2 Fowl. Ex. Pr. 129.

(*ll*) 4 Maule, & Sel. 497. For the method of suppressing depositions, vide post, Sect. VIII.

(*m*) Dean and Chapter of Ely v. Stewart, 2 Atk. 44.

Scandal &c.

parts of a case which can only be proved by a witness examined on behalf of the adverse party, the proper course is, not to endeavour to establish them by cross-examining that witness, but to exhibit original interrogatories for the examination of such witness in chief; otherwise there will be a risk that the evidence of such witness, as to those points, will be lost; for, if the reading of the deposition of the witness to the cross-interrogatory be objected to at the hearing as involving new points, the other party may also prevent the reading of the cross-deposition by refusing to read the examination in chief (*n*).

Interrogatories may be referred for scandal; but not for impertinence alone.

Interrogatories, like all other proceedings in the Court, may be the subject of a reference for scandal (*o*). It seems, however, that they cannot be referred for impertinence alone (*p*). The method of obtaining and proceeding upon a reference of this nature will be considered in a future section; it need only be observed here, that, if the witness himself objects to the interrogatory upon this ground, he should do so, by demurrer, before he answers it (*q*).

Form of original interrogatories. Title.

Interrogatories for the examination of witnesses in a cause are entitled, '*Interrogatories to be exhibited to witnesses to be produced, sworn, and examined in a certain cause now depending and at issue in the High Court of Chancery, wherein A. B. is plaintiff, and C. D. is defendant, on the part and behalf of the above-named plaintiff,* (or defendant, as the case may be.) Care must be taken, in framing the interrogatories, that the title of the cause is properly set out, as any mistake in this particular may be fatal to the depositions. Thus, where the plaintiff's christian name was mistaken in the title of the interrogatories, the depositions could not be read, nor would the Court permit the title to be amended, though most of the witnesses had, since their examination, gone to sea (*r*). The reason of requiring this particularity, in the title, is the impossibility there would be of maintaining an indictment for perjury

(*n*) Smith v. Biggs, 5 Sim. 392.

(*o*) Cox v. Worthington, 2 Atk. 236.

(*p*) White v. Fussell, 19 Ves. 113. Vide Pyncent v. Pyncent, 3 Atk. 557.

(*q*) Jefferis v. Whittuck, 2 Pri. 486; sed vide Ashton v. Ashton, 1 Vern. 165; 1 Eq. Ca. Ab. 41, S. C.

(*r*) White v. Taylor, 2 Vern. 435.

Form of.

if such variance between the title of the cause and that of the interrogatories should appear.

First interrogatory as to knowledge of the parties.

It is usual to prefix to all interrogatories, a general inquiry as to the witnesses' knowledge of the parties, and the time when the witness first became acquainted with each,' &c. Orders appear to have formerly been promulgated by the Court, to restrict this practice, by which it is directed 'that the articles which are usually thrust into the beginning of every schedule of interrogatories, as it were of form or course, touching the witnesses' knowledge of the parties, plaintiffs or defendants, of the lands, towns, and places in the pleadings, and the like, be not so needlessly used as they are(s); but, notwithstanding this order, the practice of introducing a general inquiry of this nature, is almost invariably resorted to.

Division of interrogatories.

The interrogatories are broken into distinct interrogatories, according to the subject matter or the witnesses to be examined, but each interrogatory concludes with the following

Conclusion.

words—'*Declare the truth of the several matters in this interrogatory inquired after, according to the best of your knowledge, remembrance, and belief:*' these words, however, are mere matter of form, and are not generally inserted in the draft, but are supplied in the engrossment.

Last interrogatory.

It has frequently happened, that, in framing the interrogatories, some point to which it is important that a witness should depose, has been omitted; or else it has been found that a witness is capable of deposing as to some matter as to which it was not, at the time, known that any witness could speak, in consequence of which, evidence which would be important to the party would be omitted, from the circumstance of no question being addressed to the witness calculated

Under the old practice.

to elicit it; it therefore became the practice to add to each set of interrogatories, a general interrogatory calling upon the witness to state *whether he knew or could set forth any matter or thing which might in anywise tend to the benefit or advantage of the party for whom he appeared, other than what he had been interrogated to?* And the witness, being examined upon this interrogatory, then stated whatever matter he had to prove to which no special interrogatory had been ad-

(s) Beames's Ord. 71

dressed. It was conceived, however, that this form of interrogatory was objectionable, because it called upon the witness to state, only that which he knew would be favourable to one party; whereas he is bound, by his oath, to state not only what is important to the party examining him, but the *whole truth,* without favour to either party, so that the witness, by confining himself to the terms of the interrogatory, might, by concealing what he knew, as far as it would be prejudicial to the party examining him, tamper with his conscience. It is submitted, however, that this result was effectually obviated by the form of the interrogatory, which not only called upon the witness to state whether he knew any thing which might benefit the party for whom he appeared, but required him, if he did, '*to set forth the same, and all the circumstances and particulars thereof, according to the best of his knowledge, remembrance, and belief;*' it has nevertheless been considered right that the form of the general interrogatory should be altered; and by the Orders of December, 1833 (*t*), it has been directed 'that the last interrogatory now commonly in use be in future altered and shall stand and be in the words or to the effect following: "*Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination, or to the matters in question in this cause,*" If yea, set forth the same, &c.'

Form of.

Under the New Orders.

It is obvious, however, that this interrogatory, if administered to a witness, whatever objections may have existed as to the old form, would, in many cases, be productive of much more serious inconvenience, and, if the terms of it be strictly followed, tend to load the depositions with matter which may be wholly irrelevant and useless. For if a witness who is to be examined under this interrogatory, to prove a fact, as to which he may not have been particularly questioned, is to state, not only what he knows as to that fact, but the whole of what he may happen to know affecting all the parties to the cause, there is no limit to which his depositions may not in some instances extend; on the other hand, if he is to state only what he knows as to one particular fact, when

Inconvenience of new form.

(*t*) Ord. XXXII.

Form of.

perhaps, he is acquainted with many other facts as to which his deposition is not wanted, he tampers with his conscience much more than he would do under the old form, when being asked whether he knows any other matter or thing which may benefit the particular party on whose behalf he is examined, he is called upon to state what that matter is, and all the circumstances relating thereto.

Need not be used.

But although the order directs where a general interrogatory of the nature of that formerly used as the last, is made use of, the form shall be that prescribed, it does not compel a party to use it (*u*). So that it is optional with the draftsman to insert a general interrogatory or not. Where, howe-

Unless a general interrogatory is required.

ever, he does insert one, it must be in the form prescribed by the 32nd Order, otherwise the deposition taken upon it may be suppressed upon motion (*x*).

The interrogatories being drawn and signed by Counsel, must be copied upon parchment, and, if intended for the examination of witnesses in London, or within twenty miles of it,

Filing of with Examiner. Where there is also a commission.

they must be left with one of the Examiners of the Court, which is termed *filing interrogatories* (*y*), but if any of the witnesses are to be examined by commission, the plaintiff should file, with the Examiner, such interrogatories only as apply to witnesses resident within the jurisdiction of the Examiner's Office (*z*).

Selection of interrogatories.

It is to be observed, that the practice is, to draw all the original interrogatories exhibited on behalf of one party in one set or schedule, leaving the selection of such as are proper for the particular witnesses to the Solicitor (*a*), and where some of the witnesses of a party reside in London and some in the country, it is necessary to have one set of interrogatories only drawn by Counsel; and the Solicitor, in procuring the same to be engrossed, distinguishes and copies those intended for the examination of town witnesses, separate from those intended for country witnesses (*b*).

New interrogatories allowed before examination.

If the interrogatories are to be exhibited in the Examiner's Office, and witnesses are examined thereon, either party may,

(*u*) Gover v. Lucas, 8 Sim. 200.
(*x*) Ibid.
(*y*) 1 Turn. & V. 191.
(*z*) Ibid Hind. 320 n.
(*a*) Vide Beames's Ord. 71.
(*b*) 1 Smith's Ch. Pr. Ed. 1838, p. 354.

without application to the Court or order for the purpose, exhibit one or more interrogatories, or a new set of interrogatories for the further examination of the same or other witnesses (*c*). But when a commission is taken out, the practice is different. In *Campbell* v. *Scougal* (*d*), it appears to have been represented at the bar, that the practice in country causes in England, is to feed the Commissioners from time to time with interrogatories for the examination, as they can be presented either for original or cross-examination, until the Commissioners find that the supply of witnesses is exhausted; and although Lord Eldon observes that there was no doubt, that of late, interrogatories had been sent down into the country, from time to time, as often as prudence required and were returned, and that the Court had acted upon examinations so taken and returned, yet his Lordship said the practice was not so formerly; and that he had frequently, when at the bar, drawn interrogatories guessing at what any witness to be examined to any fact in issue, could possibly represent, and that the interrogatories, both for the cross-examination and for the original examination of the defendants' witnesses, were prepared before the commission was opened: and notwithstanding the representation made at the bar, the practice of the Court appears still to be in conformity with his lordship's recollection. Indeed it obviously must be so, from the nature of the oath which is administered to the commissioners, which, as we shall presently see, is limited to the examination of witnesses ,upon the interrogatories—'*Now*' (*i. e.* at the time of administering the oath,) '*produced and left with you.*' (*e*) It follows, therefore, that if where a commission is issued, additional interrogatories, either for examination in chief or cross-examination, are required to be exhibited after the commission has been opened, an order for that purpose must be obtained (*f*).

Additional interrogatories.

Secus before Commissioners.

Unless by special order.

It is to be observed, however, that notwithstanding a commission has been issued, and the parties have joined in it, and

But new interrogatories may be exhibited before Examiner notwithstanding commission.

(*c*) 1 Smith's Ch. Pr. Ed. 1838, p. 354.

(*d*) 19 Ves. 552.

(*e*) Vide post.

(*f*) 1 Smith, Ed. 1838, p. 366, and vide Carter v. Draper, 2 Sim. 53.

Interrogatories. witnesses have been examined, new interrogatories may be exhibited into Court, (*i. e.* before the Examiner,) for the examination of new witnesses at any time before publication (*g*); but if a witness has been examined by Commissioners in the country, he cannot be examined again before the Examiner, without a special order (*h*).

Cross interrogatories. Interrogatories for the cross-examination of witnesses, differ very little in form from original interrogatories; they may be filed with the Examiner who examines in chief (*i*). Formerly this could not be done without a special order (*k*).

Sect. III.

Of the Examination of Witnesses by the Examiner.

Examination by Examiner. Witnesses in Chancery are examined either by an Examiner or by Commissioners specially appointed for that purpose by commission under the great seal.

In what cases. When the witnesses to be examined are resident within twenty miles of London, the examination must be by the Examiners of the Court; and so it may if they live at a greater distance, and the party thinks proper to bring them up to London.

Why called an examination in Court. It is to be noticed, that an examination by the Examiner is frequently termed *an examination in Court*, because, anciently, the examination was before a judge of the Court. This judge was generally the Master of the Rolls, who, as the business of the Court increased, left the examination of witnesses to his Clerks; so that the examination before the judge gradually fell into de-suetude, and the practice arose of examining all witnesses, within a certain distance from town, before the Examiners, who, having been originally the deputies of the judge,

(*g*) Lewis v. Owen, 1 Dick. 6; Beames's Ord. 96, S. C.; Hind. 333.

(*h*) Hind. 333.

(*i*) Ord. 1833, XXVI.

(*k*) Turner v. Burleigh, 17 Ves. 354.

the examination by them still continued to be treated as an examination in Court (*a*).

Attendance of Witnesses.

Of fixing the time.

The first thing to be done by the party intending to examine witnesses before the Examiner, is to file his interrogatories, or such of them as apply to the witnesses to be examined, in the manner before pointed out (*b*). He must then procure the attendance of his witnesses at the Examiner's Office; for which purpose he ought to fix a day with the Examiner when he will be able to examine him, and to give notice of such day to the witness.

Subpœna ad testificandum.

Where there is reason to suppose a witness will not voluntarily attend to be examined, recourse must be had to the compulsory process of a writ of *subpœna ad testificandum,* which commands the witness to whom it is directed to appear before the Examiner to testify on behalf of the party requiring his testimony (*c*).

How obtained.

By the orders of the 21st of December, 1833, this writ is to be obtained in the same manner as a *subpœna ad respondendum* (*d*); and the form of it, as prescribed by the same order, is as follows:—

Form of.

'*Victoria, &c.*

To *Greeting.*

We command you, (and every of you,) that, laying all other matters aside, and notwithstanding any excuse, you personally be and appear before Mr. , *one of the Examiners of witnesses in our High Court of Chancery, at his office in Rolls' Yard, Chancery Lane, London, at such times as the bearer hereof shall, by notice in writing, appoint, to testify the truth, according to your knowledge, in a certain cause depending in our said Court of Chancery, wherein* [and others or another] *are plaintiffs, and* [and others or another] *are defendants, on the part of the* ; *and hereof fail not, at your peril. Witness, &c.*'

Subpœna duces tecum.

In case the witness is required to bring with him any written document in his possession, then the writ must be a

(*a*) Hind. 314.
(*b*) Supra, p. 472.
(*c*) Hind. 326.
(*d*) Vide ante, vol. 1, sect. 4, pp. 560, 562.

Attendance of Witnesses.

subpœna duces tecum, which is in the same form as the ordinary subpœna, except that, before the words, 'and hereof fail not at your peril,' the words '*and that you then and there bring with you and produce*' [the documents required] are inserted (*e*).

Subpœna to contain three names, where necessary. Except a *duces tecum*.

Every subpœna, other than a *subpœna duces tecum*, must contain three names, where necessary or required (*f*); and no more than three persons can be included in one *subpœna duces tecum;* but the party suing out the same is at liberty to sue a subpœna for each person, if it shall be deemed necessary or desirable to do so (*g*). It is to be observed, that in a case of a subpœna of this nature, husband and wife are considered as two distinct persons, and that her christian and surname must be inserted accordingly (*h*).

Husband and wife distinct persons.

Indorsement.

The name or firm, and the place of business or residence, of the Solicitor or Solicitors issuing the subpœna, must be indorsed thereon, and where such Solicitors are agents only, then the name or firm, and place of business or residence, of the principal Solicitor or Solicitors must be added to the indorsement (*i*).

Costs.

The costs of an ordinary *subpœna ad testificandum* and *præcipe* are the same as those of a *subpœna ad respondendum* and *præcipe* (*k*). Where it is a subpœna *duces tecum*, the sum of 12*s*. 6*d*. is to be allowed in costs for every such subpœna, including the *præcipe*, attendance, and sum paid for sealing the same (*l*).

Time for serving.

The time for serving every subpœna is limited to the last day of the term next following the term or vacation in which it was sued out; and in the interval between the suing out and service, the party suing out the same is at liberty to correct any errors in the names of parties or witnesses, and to have the writ resealed, upon payment to the clerk at the Subpœna Office of a fee of one shilling, and at the same time leaving a corrected *præcipe* of such subpœna, marked 'Altered and resealed,' and signed with the name and address of the Solicitor or Solicitors suing out the same (*m*).

Correction of mistake.

(*e*) Ord. 21st Dec., 1833, Appx.
(*f*) Ord. 1833, Ord. V.
(*g*) Ibid. Ord. VI.
(*h*) Ibid. 227.
(*i*) Ord. 1833, III.
(*k*) Ante, v. 1. p. 558.
(*l*) Ord. 1833, VI.
(*m*) Ord. 1833, VII.

Attendance of Witnesses.

Service of.

The service of this subpœna must in all cases be personal (*n*,) and is effected by delivering a copy of the writ and of the indorsement thereon to the witness, and shewing him the original writ (*o*). At the same time that he is served with the writ, the witness should be served with a notice in writing, specifying the time when he is to attend the Examiner in pusuance of it.

Notice of time for attendance, —must be reasonable.

The time fixed by this notice should be a reasonable one; and it is to be observed, that no witness is bound to attend, unless his reasonable expenses are paid or tendered to him, except he reside within the bills of mortality, and is summoned to give evidence within the same; nor, if he appears, is he bound to give evidence until such charges are actually paid him (*p*).

Tender of expenses; —where witness is a married woman.

It is said, that, if the witness whose attendance is required be a married woman, it will be necessary to serve the subpœna upon her personally, and that the tender of the expenses should be made to her, and not to her husband (*q*).

Process to enforce obedience.

Where witness has not attended the examiner.

If a witness, upon being served with a subpœna and notice in the manner before stated, neglect or refuse to attend to be examined, a certificate *of the interrogatories having been filed, and that the witness has not attended to be sworn to them,* must be obtained from the Examiner, and an affidavit must be made and filed at the Affidavit Office of the personal service of the subpœna, and of the notice in writing delivered at the same time. An application is next to be made, by motion of course, in Court, *that the witness do, at his own expense, attend, and be sworn and examined, in four days, or that he may stand committed to the Fleet Prison;* and the Court, upon hearing the certificate and affidavit read, will make an order upon the witness that he attend the Examiner and be examined to the interrogatories filed, in four days after personal service of the order, or, in default, that he stand committed to the Fleet Prison (*r*).

Committal to prison

This order being drawn up, passed, and entered, a copy of it must be served upon the witness *personally,* the original

(*n*) Hind. 327.
(*o*) Ord 1833, IV
(*p*) Hind. 328. Vide Phil. & Amos, 734.
(*q*) Phil & Amos, 732.
(*r*) Hind. 329.

Attendance of Witnesses.

order being shewn him at the same time. And if the witness obstinately persists in his neglect or refusal to attend, an affidavit of the service of the order must be made and filed, and another certificate obtained from the Examiner *that the witness has not attended* to be sworn to the interrogatories; the Court, then, upon a further application, by motion of course, will make an order for the commitment of the witness to the Fleet Prison, the affidavit of personal service of the former order, and the certificate from the Examiner being read in Court at the time of the motion. This order being drawn up, passed, and entered, must be delivered to the Tipstaff attending the Court, who will thereupon procure a warrant from the Lord Chancellor's Secretary, and, being instructed as to the person and residence of the witness, will apprehend and convey him to the Warden of the Fleet Prison, where he must remain in custody, not only until he has been examined upon the interrogatories, but also until payment of costs to the party requiring his testimony, to be taxed by a Master, and likewise the Tipstaff's and Warden's fees for taking and detaining him (*s*).

Discharge.

A witness thus dealt with, after he has been examined, and tendered or paid the costs, will, upon motion or petition, and production of the Examiner's certificate of his examination being complete, be discharged by the Court, or by the Lord Chancellor, or Master of the Rolls, or Vice-Chancellor, if the Court be not sitting, or he may be discharged by the party at whose instance he was committed, if the Warden of the Fleet can be prevailed upon to take such discharge (*t*).

Where he has been sworn, but refuses to be examined.

The method is, *mutatis mutandis*, the same when a witness is sworn to the interrogatories, and afterwards refuses or neglects to attend the examination upon them (*u*); or where, having attended, in obedience to the subpœna, he refuses to be sworn (*x*).

—or to produce a document.

Where a witness, attending upon a *subpœna duces tecum*, refused to produce the document mentioned in the writ when required, he was ordered, upon special motion, to attend again and produce it, and to pay the plaintiff all the costs occasioned by his refusal (*y*).

(*s*) Hind. 629.
(*t*) Ibid. 330.
(*u*) Ibid.
(*x*) Hennegal v. Evance, 12 Ves. 201.
(*y*) Bradshaw v. Bradshaw, 1 R. & M. 258.

Swearing, &c.

How sworn.

Formerly, the Examiner had no power to administer an oath; and, therefore, when a witness attended to be examined, a Clerk from the Examiner's Office accompanied him to the public office to be sworn to the interrogatories before the sitting Master there. But this has now become unnecessary, as, by stat. 3 & 4 W. 4, c. 94, s. 27, the Examiners of the High Court of Chancery are authorized and empowered to administer the usual and accustomed oaths, and to take the usual affirmations of the witnesses examined before them.

Where witness is in prison,

If the witness be in the Fleet, or any other prison within twenty miles of the metropolis, his situation must be represented to the Examiner, who will fix a day for attending at the prison to swear and examine the witness; and a notice in writing, specifying the title of the cause, the name and place of confinement of the witness, and the party's intention of examining the witness on the day fixed, must then be served on the adverse Clerk in Court by leaving a copy of such notice with the Clerk in Court personally, or with his agent at his seat in the Six Clerks' Office, two days previously to the examination of the witness, in order to give the adverse party an opportunity of cross-examining such witness, if he is so advised. The Examiner, (with whom the interrogatories for the examination of such witness should have been previously left,) will then proceed to the prison, taking the interrogatories with him, and, the witness being sworn thereto in the common form, the examination is taken in the usual manner, and the depositions and interrogatories are returned by the Examiner to the office, to be kept, as in ordinary cases, until publication pass in the cause (z).

—or sick.

In like manner, if a witness, residing within twenty miles of London, be incapable, by reason of sickness, of attending at the Examiner's Office to be examined, and it is not thought necessary to sue out a commission to take his examination, the Examiner may go to the place of the witness's residence and

(z) Before the Stat. 3 & 4 W. 4, c. 94, it was necessary that the Master should go to the prison, as well as the Examiner, for the purpose of administering the oath. Hind. 330.

Swearing, &c.

administer the oath and take the deposition of the witness (*a*), notice of the name and place of abode of the witness, and of the day and place where the witness is intended to be examined, and on whose behalf, having been served upon the adverse Clerk in Court, in the manner before pointed out, two days previous to the day fixed for the examination of the witness, in order to give the other side an opportunity for cross-examining him (*b*).

The form of the oath administered to witnesses in Chancery is as follows;—

Form of the oath.

'*You shall true answer make to all such questions as shall be asked of you on these interrogatories, without favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth:* So help you God.'

Affirmation.

In ordinary cases, where the witness is a Christian, the oath is administered upon the Holy Evangelists; where the witness is a Quaker or Moravian, or comes within any other denomination of dissenters who are allowed to give evidence upon their solemn affirmation, instead of upon oath, an affirmation is substituted for the oath.

Where witness is not a Christian.

Persons not professing the Christian religion may be sworn according to the peculiar ceremonies of their own religion (*c*). It is presumed, however, that a previous order will be necessary to warrant a departure from the ordinary practice.

A peer must be sworn.

It is to be noticed, that a peer, although privileged to put in his answer upon his attestation of honour, must, when called upon, to give evidence as a witness, do so upon oath; and this rule applies as well to affidavits and examinations before the Master, as to depositions before the Examiner or Commissioners (*d*).

Proceeding after witness has been sworn.

After the witness has been sworn to the interrogatories, a *jurat*', stating the producing and swearing of the witness to the

(*a*) An order for this purpose seems to be necessary. Vide Anon. 4 Mad. 463. *Sed quære*, if the Examiner is willing to go without an order?

(*b*) Hind. 331.

(*c*) Vide ante, p. 270, and Phil. & Amos, 10.

(*d*) Meers v. Lord Stourton, 1 P. Wms. 146 It is not stated in any of the books of practice what the process is to compel the attendance of a peer or other person having the privilege of parliament as a witness; but it is presumed that it must be by sequestration, in the same way that his appearance as a party is enforced.

interrogatories, with his name and the day and year when sworn, is inscribed upon the interrogatories, and signed by the Examiner (*e*). If, after the witness has been sworn, any alteration is made in the title or any other part of the interrogatories, they must be re-sworn, but not re-produced (*f*).

Swearing, &c

When new interrogatories are added, the witness must be sworn to them in the same form.

Under the old practice of the Court, it was necessary, when a witness attended at the Examiners' Office to be examined, to produce him in person, and shew him at the seat of the adverse Clerk in Court, and at the same time to leave at such seat a note in writing of his name and place of abode (*g*); but, by the 16th of Lord Lyndhurst's Orders, it is directed, 'that no witness to be examined before either of the Examiners for any party in a cause, be in future produced at the seat of the Clerk in Court for the opposite party; but that a notice in writing of the name and description of the witness be served there as heretofore.' This notice is given in pursuance of Lord Clarendon's Orders (*h*), which direct, that 'the Examiner is to take care and be well satisfied that such notice is given, and then shall add to the title of the witness's examination, the time of such notice being given, and the name of the person to whom it is given, and by whom; that, at the hearing of the cause, the suitor be not delayed upon pretence of want of notice.'

Witness not to be produced to adverse Clerk in Court; —but notice of his name, &c., must be given.

We have seen before (*i*), that where a party to the cause is to be examined as a witness, the order for his examination must be produced to the Examiner; the same notice of his being under examination which is required to be given in the case of other witnesses, must also be given at the seat of the Six Clerk of the adverse party (*k*).

Where witness is a party, order for examination must be shewn.

Before the witnesses are examined, the Examiner ought to be, and generally is, furnished with instructions as to which of

Instructions for Examiner.

(*e*) Hind. 322.
(*f*) Vide Mr. Plumer's return of the duties of Examiners to the Chancery Commission, Chan. Rep. Appx. B., No. 22, p. 542.
(*g*) Ibid.
(*h*) Beames's Ord. 185.
(*i*) Ante, p. 460.
(*k*) As to the form of this notice, vide Mulvany v. Dillon, 1 Ball & B. 413. Vide etiam Ellis v. Deane, 3 Moll. 48-57.

Method of examination

the interrogatories each witness is to be examined upon. The Solicitor also supplies a minute of the evidence he expects his witness to give; but of such minute no use can be made in the examination (*l*).

After the examination is begun, the Examiner ought not to confer with either party touching the examination, or take new instructions respecting the same (*m*).

Method of examination.

With respect to the method of examining a witness, Lord Clarendon's Orders, which have been before referred to, direct, that 'the Examiner is to examine the deponent to the interrogatories directed *seriatim*, and not to permit him to read over, or hear read, any other interrogatories, until that in hand be fully finished; much less is he to suffer the deponent to have the interrogatories, and pen his own depositions, or depart, after he hath heard an interrogatory read over, until he hath perfected his examination thereto. And if any witness shall refuse so to conform himself, the Examiner is thereof to give notice to the Clerk of the other side, and to proceed no further in his examination without the consent of the said Clerk or order made in Court to warrant his so doing (*n*).' The same Orders afterwards direct, that 'the Examiners, in whom the Court reposeth great confidence, are themselves in person to be diligent in the examination of witnesses, and not to intrust the same to mean and inferior Clerks, and are to take care and hold the witness to the point interrogated, and not to run into extravagancies and not pertinent to the question (*o*). "More-over, they are not to use any idle repetitions or needless circumstances, nor to set down any answer to a question to which the examinant cannot depose other than thus, '*to such an interrogatory this examinant cannot depose;*' and in case such impertinencies be observed by the Court, the Examiner is to recompense the charge thereof to the party grieved, as the Court shall direct (*p*).'

Examiner may explain interrogatory.

The Examiner is not strictly bound to the letter of the interrogatories, but ought to explain every matter or thing

(*l*) Mr. Plumer's statement, *ubi supra.*

(*m*) Hind. 325; 4 Inst. 278.

(*n*) Beames's Ord. 187.

(*o*) Ibid. 188.

(*p*) Ibid. 190.

which ariseth necessarily thereupon (*q*); and forasmuch as the witness, by his oath, which is so sacred, calleth Almighty God, (who is truth itself, and cannot be deceived, and hath knowledge of the secrets of the heart,) to witness that which he shall depose, it is the duty of the Examiner gravely, temperately, and leisurely to take the depositions of witnesses, without any menace, disturbance, or interruption of them in hindrance of the truth (*r*).

Method of examination.

The Examiner, having read an interrogatory to the witness, takes down the answer in writing upon paper, concluding the answer to each interrogatory before the following one is put.

Depositions, how to be taken down.

A witness may be permitted to use such short notes as he brings with him to refresh his memory, but not the substance of his depositions; nor may he transcribe such notes *verbatim* (*s*). The rule at law is, in this respect the same; and in an anonymous case in Mr. Ambler's reports (*t*), Lord Hardwicke said, 'that, at law, a witness is allowed to refresh his memory by notes as to dates and names, because there is nothing to guide the memory as to them; but he never knew a Court of Law admit the whole evidence to be given from writing. There is no certain rule how far evidence may be given from notes; some judges had thought, and he was (he said) inclined the same way, that the witness might speak from notes which were taken at the time of the transaction in question, but not if they were wrote afterwards' (*u*).

Use of notes by witness.

Rule the same as at law.

In that case, a motion was made to suppress a deposition taken before Commissioners, because the attorney for the plaintiff had written down the whole in the exact form of the deposition before it was taken; and though it appeared that the witness had told him the facts and circumstances mentioned in it, yet his Lordship said it would be of dangerous tendency to permit it to be read; for, in depositions, it is natural to state the evidence as given by the witness, but that, in the case in ques-

(*q*) Hind. 325; 4 Inst. 278. Vide etiam Peacock's case, 9 Rep. 70.

(*r*) Hind. 325; 4 Inst 278.

(*s*) Curs. Canc. 260.

(*t*) Anon Amb. 252.

(*u*) Vide Phil. & Amos, 891.

Method of examination.

tion, the attorney had methodized and worded it; and that it was, therefore, no more than an affidavit (*x*).

Depositions to be taken in the first person.

In order to secure the statement of the evidence upon the depositions in the very words of the witness, the stat. 3 & 4 W. 4, c. 94, s. 27, has enacted, that all depositions of witnesses examined in the High Court of Chancery are to be taken in the first person; formerly the practice was to take them in the third person (*y*).

Where witness does not understand English,

If a witness to be examined does not understand English, an order should be obtained to appoint an interpreter to interpret the interrogatories and depositions. The person so appointed must be sworn to interpret truly, and the depositions of the witness are to be taken down by the Examiner, from the interpretation, in English (*z*). It was Lord Nottingham who established the rule that 'no alien should be examined as a witness without a motion first made in Court to swear an interpreter, that the other side might know him, and take exceptions to the interpreter (*a*).

depositions to be read over to witness;

When all the interrogatories, upon which the Examiner has been instructed to examine the witness, have been gone through, the Examiner carefully reads over the whole deposition to the witness, who, if he be satisfied with it, signs each sheet of it in the presence of the Examiner. If the witness wishes to vary his testimony, or to make any alteration in or addition to, it, he must do so before signing the deposition; for, by an order of the Court, when witnesses are examined in Court, they are to perfect and subscribe their deposition to such interrogatories as they have answered, before they depart from the Examiner or his deputy; and they are not to be permitted to make any alteration thereof at any time thereafter without leave of the Court, unless it be in some circumstance of time or the like, or for making perfect of a sum upon view

—who may alter or add to them;

—but not after signature

—unless as to some circumstance of time, &c.

(*x*) Vide Phil. & Amos, 891. Vide etiam Shaw v. Lindsey, 15 Ves. 380; Ferry v. Fisher, cited ib. 382; Phil. & Amos, 896.

(*y*) It has been decided that this act does not apply to depositions taken by Commissioners. Dryden v. Frost, Michaelmas, 1835, cited 1 Smith's Ch. Pr. 368.

(*z*) Smith v. Kirkpatrick, 1 Dick. 103. Vide etiam Lord Belmore v. Anderson, 2 Cox, 288, and 4 Bro. C. C. 90, S. C.

(*a*) 2 Swanst. 261 (*n*).

of any deed, book, or writing, which the witness shall shew to the Examiner before he permit such alteration (*b*).

Method of examination.

It is to be noticed, that the signature of a witness to his examination is absolutely necessary, and that if a witness should die after his examination is completed, but before it is signed, the depositions cannot be made use of (*c*). It seems, however, that if a witness, having signed his examination in chief, dies before he is cross-examined, his depositions may be read as evidence; the Court, however, bearing in mind the fact that the cross-examination has not taken effect, especially if it should appear that the party had lost any material fact which was within the knowledge of the witness, and could not have been proved by other means (*d*).

Signature of witness necessary.

Death of witness before cross-examination will not affect depositions.

If a witness refuses to be cross-examined, his deposition cannot be read (*e*).

By the 26th of Lord Lyndhurst's Orders (*f*), the Examiner who takes the examination in chief is at liberty to take his cross examination also; before that time, the cross-examination of a witness was taken before a different Examiner from the one who examined him in chief; a practice which appears to have been sanctioned by the Statute 50 G. 3, c. 8, by which it was directed, that the witnesses on different sides of the same cause should, (if the same was practicable,) be examined by different Examiners (*g*).

Cross-examination.

We have seen before, that, previously to the examination of a witness, a notice in writing of the name and description of the witness is to be served upon the adverse Clerk in Court. The object of this notice is, that in case the adverse party shall have occasion to cross-examine the witness, he may have an opportunity of doing so; and accordingly, upon receiving the notice, the Clerk in Court sends it to his client, who, if it

Where witness is resident in town.

(*b*) Beames's Ord. 71.
(*c*) Copeland v. Stanton, 1 P. Wms. 414.
(*d*) O'Callaghan v. Murphy, 2 Sch. & Lef. 158.
(*e*) Prac. Reg.
(*f*) Ord. 1828.
(*g*) Turner v. Burleigh, 17 Ves 354.

Cross-examination.

be necessary to cross-examine the witness, causes cross-interrogatories to be prepared and filed for that purpose. These cross-interrogatories ought to be filed before the examination in chief is completed; and if they are so filed, the party producing the witness is obliged to procure him to stay or return to be examined (*h*). If a witness refuses to be cross-examined, it is a cause of exception to his testimony, and the Court, on motion, will suppress his deposition (*i*).

Where cross-interrogatories not filed before examination terminated.

Where the interrogatories for cross-examining a witness are not filed, or the witness is not required to be cross-examined whilst he is under original examination, but is allowed to depart about his business, the party who intends to cross-examine that witness must procure his examination in the best manner he can; the adverse party is not bound to produce him again; but as it is usual after the witness is sworn, if he be resident in London, for the Examiner to appoint some other day for him to attend to be examined (*k*), the party intending to cross-examine has generally sufficient opportunity to prepare and file his interrogatories. In the mean time, however, to prevent the examination being taken without the cross-examination, a note in writing may be stuck up in the Examiner's Office, that if *such a person* come to be examined in *such a cause*, let him be cross-examined; or the Examiner may be instructed to take care that the witness be cross-examined whilst he is under examination, which seems the better method (*l*).

Where witness refuses to be cross-examined,

If a witness refuses to attend to be cross-examined, an application may be made to the Court, (it is presumed in the manner already pointed out in the case of a witness refusing to be examined in chief (*m*)), which will compel the witness to do what the party has a right to require of him (*n*).

Some doubt appears to exist whether a subpœna will lie to compel a witness to attend for the purpose of being cross-examined.

(*h*) Hind. 323.
(*i*) Ib. 346, (n.)
(*k*) Ib. 323. The depositions, however, always bear date the day of the swearing.
(*l*) Ibid.
(*m*) Ante, p.
(*n*) Courtenay v. Hoskins, 2 Russ. 253.

Cross-examination.

Where witness is brought up from the country.

It is to be noticed, that there is a difference in the practice between cases in which a witness is resident in London and those in which he is resident in the country and is brought up to be examined in town. When the witness resides in London, the swearing him on one day and fixing another day for his examination, can be productive of little, if any, inconvenience. The case, however, is different when the witness comes up from the country; there the bringing him up to town, for the purpose of being sworn, and then detaining him till a future day for his examination, may be productive both of inconvenience and expense. The practice, therefore, is, for a witness coming from the country to be examined on the same day that he is sworn. In order, however, to secure to the other party an opportunity for cross-examining him, the party producing a witness from the country is bound to keep him in town for forty-eight hours from the time of giving the notice to the adverse Clerk in Court; and if, during that time, interrogatories are filed for cross-examining him, and he is sworn to give evidence on the cross-interrogatories, the party who has brought the witness to town is bound to keep him in town, at his own expense, till the cross-examination is finished; and if he allows the witness to leave town before the forty-eight hours are expired, or before the cross-examination is finished, he is bound to bring him up again to be cross-examined at his own expense (*o*).

—and departs before the expiration of forty-eight hours,

It is to be observed, that the forty-eight hours are to commence from the time of the notice, and not from the time when the examination in chief is completed (*p*); and that, if the witness departs before the expiration of the forty-eight hours, or, if his cross-examination be commenced, before the same is completed, an order will be made, upon application to the Court, by motion, that the party calling him do, at his own expense, produce him before the Examiner, within a limited time after service of the order, to be cross-examined, or that, in default, his evidence given in chief will be suppressed (*q*).

—or secretes himself

A similar order will also be made where the witness secretes himself (*r*), but the mere circumstance that a witness refuses to

(*o*) For. Rom. 144. Flowerday v. Collet, 1 Dick. 288; Whittuck v. Lysaght, 1 S. & S. 416.

(*p*) Ibid.

(*q*) Ibid

(*r*) Flowerday v. Collet, ubi *supra*.

Cross-examination.

attend to be cross-examined, will not be a sufficient ground for making such an order; the party intending to cross-examine should, upon such refusal, apply to the Court, which, as we have seen, will compel the witness to do what such party has a right to require of him (*s*).

If a party examining a witness does not allow a sufficient time for cross-examination before the time for passing publication expires, and cross-interrogatories are left, such party must either enlarge publication or the deposition will be suppressed (*t*).

A witness who is cross-examined must be sworn to the cross-interrogatories as well as to the original interrogatories.

Examination may continue till publication:

Where the Examiner has been served with a copy of a rule to pass publication he cannot, after the day fixed by such rule for passing publication, examine any more witnesses even though the witnesses have been already sworn (*u*), unless he is served with an order to enlarge publication; in which case either party may examine their witnesses as long as the publication continues enlarged (*x*). Where, however, a witness was examined, by mistake, two days after publication had passed, and was cross-examined by the defendant, the Court would not suppress the deposition (*y*).

—till the return of the commission under the 17th Order.

It is to be remarked, also, that, by the 17th of Lord Lyndhurst's Orders, as amended in 1831, it is directed, that when any commission for the examination of witnesses issues, pursuant to that or the last foregoing Order, (viz., the 16th,) publication shall stand, (*i. e.*, without further order,) enlarged, until the commission be returnable; it is, therefore, presumed, that, in such a case, the Examiner may proceed to examine witnesses in town until the return of the commission, although a rule to pass publication at a previous time may have been served upon him; and that, in fact, a commission under the 17th or 16th Orders operates in itself as an order to enlarge publication until the return of such commission.

(*s*) Courtenay v. Hoskins, 2 Russ. 253.

(*t*) 1 Smith's Ch. Pr 359.

(*u*) Beames's Ord. 73, 186.

(*x*) Anon. 1 Vern. 253.

(*y*) Hammond v ——, 4 Dick. 50.

Sect. IV.

Examination of Witnesses.

By Commission.

Commission to *examine witnesses in England*, in what cases necessary.

It has been before stated, that, anciently, the examination of witnesses was before the Master of the Rolls, who afterwards delegated this duty to his Clerks, the present Examiners, and that such examination was then and still is called an examination in Court. As, however, it frequently happened, that witnesses were aged or infirm, or lived at a remote distance from the Court, it was thought more convenient to appoint commissioners to examine such witnesses, the Court sending a Notary of its own, who was often in the Commission with them, but which practice of sending a Notary has now been discontinued (*a*).

Within what distance of London.

In Lord Clarendon's Orders (*b*), it is ordered, that no commission *ad examinandum testes* be executed in London, or within ten miles thereof, without special order first obtained upon affidavit made of the party's inability to travel, or other good matter, &c.; from which it appears, that, up to that time, the jurisdiction of the Examiner extended only to a circuit of ten miles round London, and that commissions might be issued for the examination of witnesses resident beyond that distance; a long and approved course of practice, however, has extended that distance to twenty miles (*c*), and a party cannot have a commission for the examination of witnesses, unless such witnesses be resident beyond twenty miles from the Court. If any commission is made out, or witnesses examined, within the district to which the Examiner's Office extends, the depositions taken upon such commission will, upon complaint, be suppressed; and in a case where the com-

(*a*) Hind. 334.
(*b*) Beames's Ord. 183.
(*c*) Hind. 331; ibid. 314 n.

In England. mission was executed and the witnesses examined at a tavern in Chancery Lane, the Clerk in Court who made out the commission was committed for misbehaviour (*d*).

In the case, indeed, of the sickness, or of the inability to travel, of any witness resident within the prescribed limits, a commission for the examination of such witness may be obtained upon motion supported by affidavit; but the more usual course in such cases, is to procure the attendance of the Examiner at the place of such witness's abode, in the manner before pointed out (*e*).

How obtained.

—under new practice.

A commission to examine witnesses, cannot be obtained without an order, which, however, may be procured either by motion of course, or by petition at the rolls. Formerly, the order for a commission was added to the order for the *subpœna* to rejoin, returnable immediately; but the necessity for that order having been taken away, it is usually a substantive order (*f*). An order for a commission to examine witnesses in England, cannot be obtained before the cause is at issue; unless it be in one of those cases in which the Court authorizes such a commission to examine witnesses *de bene esse*, which will be noticed in the next section. In cases, also, where the Bill has been exhibited for the purpose of perpetuating testimony, and the defendant is in contempt to an attachment for want of an answer, the Court has allowed the plaintiff to have a commission to examine his witnesses (*g*).

-By plaintiff.

Where no motion to dismiss has been made.

With respect to the time, within which the order for the commission must be obtained and served by the plaintiff, the following appear to be the rules by which the practice is to be guided according to the 17th Order of 1828, as amended in 1831, which, as we have seen, is equally applicable to cases in which the plaintiff appears, and enters into the usual undertaking, upon a motion to dismiss his Bill for want of prosecution, as to cases in which no motion to dismiss has been made.

It will be seen, upon reference to a former section, that where a plaintiff requires a commission to examine witnesses, he must,

(*d*) For. Rom. 143.
(*e*) Supra, p. 475.
(*f*) Ante, p. 391.
(*g*) Lancaster v. Lancaster, 6 Sim. 439. Vide etiam Coveny v. Athill, 1 Dick. 355.

In England.

under the 17th Order, where he has not filed his replication, in consequence of a motion to dismiss, serve his subpœna to rejoin, and obtain and serve the order for a commission, within three weeks from the filing of his replication (*h*). If a motion to dismiss has been made, and he has appeared upon it and entered into the usual undertaking, he must, in that case, obtain and serve his order for a commission, within three weeks from the date of the order made upon the motion to dismiss (*i*).

Where plaintiff has entered into an undertaking to speed.

In either case, however, the plaintiff must previously serve his subpœna to rejoin, *within three weeks*, from the filing of the replication in the one case, and from the entering into the undertaking in the other. If he has omitted to serve a subpœna to rejoin within that time, he cannot, (although he may afterwards, in order to prevent the dismissal of his Bill, serve one,) have a commission; but if he wishes to examine witnesses, he must bring them to the Examiner's office.

Subpœna to rejoin must have been served.

By defendant.

It is to be observed, that the above regulations with regard to the time of serving a subpœna to rejoin, and of suing out and serving an order for a commission, apply only to those cases in which the plaintiff himself requires a commission to examine witnesses. It may, however, happen, that although the plaintiff may not require a commission, he may serve a subpœna to rejoin, within three weeks, from the filing of his replication, or from the date of his undertaking to speed; in such case, if the plaintiff, having served the *subpœna* to rejoin, does not obtain and serve an order for a commission to examine witnesses within the before-mentioned period, then the defendant is at liberty, under the 17th Order (*k*), to obtain an order for a commission to examine witnesses, returnable at the like period as that on which a commission, if sued out by the plaintiff, would have been returnable, (viz,) on the first return of the second term next following, and to have the carriage of such commission; and so, if the plaintiff having obtained and served an order for a commission, actually sues out a commission, but neglects to execute the same, at or within the time stated in the 17th Order, then the defendant is entitled to an order for another commission, returnable on the last return of the term fol-

—where plaintiff does not require a commission; —but serves a subpœna to rejoin within three weeks, —and does not obtain an order for a commission, —or having obtained an order does not execute it.

(*h*) Ante. p. 380.
(*i*) Ante, p. 377.
(*k*) Ord. 1831.

In England

lowing that which is allowed to the plaintiff by the same order for the return of his commission (*l*). In *Rattenbury* v. *Fenton* (*m*), where a plaintiff served an order for a commission, within the time limited by the 17th Order, ***but did not sue out a commission*** in pursuance of it, but gave rules to produce witnesses and pass publication in the ensuing term, the Vice-Chancellor, Sir L. Shadwell, held, that the defendant was entitled to a commission under the 17th Order, and gave him an order for one accordingly.

Where subpœna to rejoin is served after three weeks.

A plaintiff who does not require a commission to examine witnesses, is not, as we have seen, bound to serve either an order for a commission, or a subpœna to rejoin, within the time limited, either by the 16th (*n*), or 17th Orders (*o*). He may however, for the purpose either of enabling him to examine witnesses in town, or of preventing an order to dismiss, serve a subpœna to rejoin at a subsequent period; in that case, or in the case of a defendant appearing to rejoin gratis (*p*), a defendant requiring a commission, cannot apply for one under the portion of the 17th Order which has just been referred to; but he must resort to the old practice of the Court, which allows a defendant, where a plaintiff does not require a commission, to sue one out for the examination of his own witnesses (*q*).

Where plaintiff has given a rule to produce witnesses.

By that practice, a plaintiff is bound, before he proceeds to pass publication and to set his cause down for hearing, to give the defendant 'a rule to produce witnesses,' which is in effect a notice to him to proceed to the examination of his witnesses. If the plaintiff does so, without suing out a commission, he has forfeited his right to sue one out; and the practice is for the defendant, if he requires a commission, then to obtain an order for one; and if he does so, within eight days after the rule was entered, the plaintiff is not at liberty to enter a rule to pass publication, till the following term (*r*); this it is presumed is still the practice, as well in cases in which a defendant sues out a commission under the 16th and 17th Orders, as in those which are regulated by the old practice; in either case, the

(*l*) Ord. 1831, XVII.
(*m*) 6 Sim. 308.
(*n*) Ante, p. 376.
(*o*) Ante, p. 380.
(*p*) Ante, p. 382.
(*q*) [illegible]nsley v. Powell, 3 Atk. 593; Hinde, 302.
(*r*) 1 Smith's Ch. Pr. 372.

defendant must wait till a rule to produce witnesses has been entered, before he can have an order for a commission to examine witnesses himself.

In England.

It is obvious, however, that a defendant might, in cases which do not come within the 17th Order, be subjected to considerable delay, by the plaintiff's omission to serve a rule to produce witnesses, unless some power existed of forcing the plaintiff to proceed; such power has, as we have seen, been provided by the practice, which allows a defendant to give a rule to produce witnesses, after the expiration of a clear term from the service of a subpœna to rejoin (*s*); after which, the defendant himself, having witnesses to examine in the country, may obtain a commission for the purpose.

Where plaintiff omits to give a rule to produce &c.

But although a defendant may, after a rule to produce witnesses has been entered by the plaintiff, by suing out a commission to examine within eight days, suspend the passing of publication, it does not appear to be necessary that he should sue out his commission within that time; for it seems, that he may obtain an order for a commission, even after the rule to pass publication has been entered, provided he does so before the time limited for shewing cause against publication has expired; and this whether the case is within the 17th Order (*t*), or not (*u*). Where, however, the case does not come within the provisions of the 16th or 17th Orders, he must, if there is any danger of publication passing before the return of the commission, obtain an order to enlarge publication. Where the case comes within the 16th or 17th Order, such a proceeding will be unnecessary, for by the 17th Order it is provided, that where any commission issues pursuant to that or the last foregoing Order, (the 16th,) publication shall stand enlarged until the commission shall be returnable. The plaintiff, however, is at liberty to set the cause down for hearing in the mean time, without any special order for that purpose.

After rule to pass publication.

Where a defendant has any witnesses to examine beyond sea (*x*), and the plaintiff has none; or where any of the defen-

In what cases a defendant may have a commission.

(*s*) Ante, p. 377.

(*t*) Rattenbury v. Fenton, 6 Sim. 368.

(*u*) 1 Smith's Ch. Pr. 372.

(*x*) Sheward v. Sheward, 2 V. & B. 117.

In England.

—although plaintiff has an order for one,

dant's witnesses live far distant from the plaintiff's, as sixty or eighty miles(y), he may have a commission to examine his own witnesses, even though he may have joined in the plaintiff's commission; but it is to be observed, that, in general, after a defendant has joined in the plaintiff's commission, he cannot have an order for another commission for the examination of his own witnesses, unless on motion, of which notice has been previously served (z); though it seems, that, if a defendant, instead of joining in the plaintiff's commission, thinks proper to have one of his own, he may obtain an order for one as of course; but in such case, if the witnesses reside at or near the place where the plaintiff's witnesses reside, the commission must be at the defendant's own expense (a).

—joinder of plaintiff in defendant's commission.

Where a defendant obtains a commission to examine his own witnesses, the plaintiff may join in commission, in the same manner as a defendant may join in commission with the plaintiff, and may cross-examine the defendant's witnesses (b); he may, also, examine witnesses of his own (c).

Duplicate commission.

It is to be noticed, that the Court will, sometimes, if it appears doubtful whether the plaintiff will execute his commission or not, (especially in injunction cases, where the object is delay,) indulge the defendant with an order for a duplicate commission, which he may make use of if the plaintiff refuses or neglects to execute his own commission (d).

Order for a commission.

The order for a commission directs, '*that the plaintiff,* [or, if the order be obtained by the defendant, *the defendant,*] *may have a commission for the examination of his witnesses in the cause. And that the defendant's* [*or plaintiff's*] *Clerk in Court do, in four days after notice thereof, join and strike Commissioners' names with the plaintiff's* [*or defendant's*] *Clerk in Court, or, in default thereof, that the plaintiff* [*or defendant*] *may have such commission directed to his own Commissioners.*

Commission *ex-parte.*

The plaintiff's Solicitor having given his Clerk in Court the names of four Commissioners, the plaintiff's Clerk in Court

(y) Hinde. 302.
(z) Bond v. Bond 4 Sim. 518.
(a) 1 Smith's Ch. Pr. 374.
(b) Hind. 303.
(c) 1 Harr. Ed. Newl. 246.
(d) Hind. 303.

In England.

may, at any time after the expiration of four days from the day of service of the order, exclusive of the day of service, call upon the defendant's Clerk in Court, by notice, to join in commission (*d*); and, upon neglect or refusal to give the Commissioners' names within *four days*, the plaintiff may take his commission *exparte*. But though this practice is, in strictness, regular, it is never closely adhered to, fair practitioners always allowing the adverse party a reasonable time to procure Commissioner's names (*e*).

Joinder in commission.

Joinder in commission (*f*) is effected in the following manner, *viz.*—First the plaintiff names a Commissioner; then the other side names one; and so alternately till each of them has named four, whom the Clerks in Court enter in their commission books (*g*).

Where more than one set of defendants.

Where there are two or more sets of defendants appearing by different Solicitors, each set is entitled to name four Commissioners (*h*).

Striking Commissioners' names.

The parties having thus *joined in commission*, the plaintiff's Clerk in Court sends to his client a list of the names furnished by the defendants, and receives instructions to which of them the commission is to be directed. The defendant's Clerk in Court in like manner receives instructions, from his client, to which of the plaintiff's Commissioners he would have the commission directed. The plaintiff's Clerk in Court having received his instructions, informs the defendant's Clerk in Court, by note in writing, that he is ready to *strike Commissioners' names;* and the defendant's Clerk in Court, being prepared and consenting, the commission books are produced and two of the names on each side are struck out, with the pen, by the respective Clerks in Court, the plaintiff's Clerk in Court first striking out the name of one of the defendant's Commissioners: the defendant's Clerk then strikes out the name of one of the plaintiff's Commissioners, and so alternately until the eight names are reduced to four (*i*).

Where more than one set of defendants.

Where there are two or more sets of defendants and each set has named four Commissioners, two of each four are struck out

(*d*) Hind. 298.
(*e*) Ibid. 303, 4.
(*f*) Hind. 298.
(*g*) 1 Harr. (Ed. Newl.) 244.
(*h*) 1 Smith's Ch Pr. 362.
(*i*) Hind. 298.

In England.

Where all the plaintiff's names are struck out.

by the plaintiff, leaving two Commissioners remaining, for each set of defendants, who join in commission. Each defendant or each set of defendants is also entitled to strike out two of the four Commissioners named by the plaintiff, so that it sometimes happens that all the plaintiff's names are struck out, in which case, he must present a petition, as of course, to the Master of the Rolls, stating the circumstances and praying that his Honor will be pleased to strike out two of the four Commissioners originally named by the plaintiff. This petition is answered by striking out two of the names; and the order made upon it must be drawn up and served upon the defendants (*k*).

Where defendant refuses to strike.

In like manner, if a defendant, *after joining in commission*, refuses to strike Commissioners' names, a petition must be addressed to the Master of the Rolls praying him to stike out two of the plaintiff's names. In such cases the plaintiff's Clerk in Court is at liberty, notwithstanding, to strike out the name of such two of the defendant's Commissioners as he shall think fit, and the commission must then go to such four of the Commissioners as are left standing (*l*).

Proceeding where commission is sued out by defendants.

The above rules are applicable to the case of the plaintiff being the party who sues out the commission, but where the commission is obtained by the defendant, the course of proceeding is the same *mutatis mutandis*.

Who may be Commissioners.

Solicitor or his Clerk cannot.

The Commissioners named in a commission to examine witnesses ought to be indifferent persons. A Solicitor in the cause, for instance, cannot be a Commissioner, and depositions taken before him will be suppressed (*m*); and the policy which excludes Solicitors extends also to Solicitors' Clerks (*n*). It seems, however, that the objection to a Solicitor does not apply where he is not concerned in the cause. In *Gordon* v. *Gordon* (*o*), Lord Eldon said, 'where the Solicitor in the cause has acted as Commissioner, the Court suppresses the depositions, but can you argue thence that the same course shall be pursued if a Commissioner is Solicitor to one of the parties in another cause?'

Secus, if not Solicitor in the cause.

(*k*) 1 Smith, ed. 183, 362.

(*l*) 1 Harr. (Ed. Newl.) 214; Hind. 304.

(*m*) Fricker v Moore, Bunb. 289; Selwyn's case, 2 Dick. 563.

(*n*) Cooke v. Wilson, 4 Mad. 380.

(*o*) 1 Swanst. 166.

In England. — Common cases of exception.

The common exceptions to Commissioners are stated to be these, *viz.* 'that he is of kindred allied to the party for whom he is named; that he is master to the party, his landlord, or partner; that he hath a suit in law with the party adverse to him for whom the Commissioner is named; or is of Counsel; or is Attorney, or Solicitor, or follower of the cause on one side; that the party is indebted to him; or any other apparent cause of partiality or siding with either party' (*p*).

Proceeding where improper Commissioner has been struck.

It is said, in a book of authority, that 'after Commissioners are struck, if it be discovered that one or more of the Commissioners is or are nearly allied, *of Counsel*, Solicitor, master, or partner with the plaintiff or defendant, or any apparent cause of partiality or siding with either party can be shewn, the Court, upon motion, or the Master of the Rolls, upon petition, will order the opposite party to name Comissioners *de novo*, in the place of one or more of them so complained against, or that the commission issue *exparte*; because, though the Commissioners are named by the party, yet that is but by way of proposal to the Court, for they are the ministers of the Court, and therefore must be impartial' (*q*).

Commissioners not to act for one side only.

It may be here remarked, that it has been declared, by Lord Eldon, that for Commissioners to consider themselves as acting for one side only, though a very common, is a very gross mistake. They are to act impartially, but, to a certain extent on both sides, they have under their particular care the interest of the party appointing them (*r*).

Solicitor's Clerk cannot be Clerk to Commissioners.

It may also be remarked, that the policy which excludes partial persons from being Commissioners extends also to exclude them from taking any part in a commission; therefore, where the Clerk of a Solicitor in the cause has been employed as Clerk to the Commissioners, the depositions under the commission have been suppressed (*s*).

It is said that if a Commissioner refuses to act, the suitor has no remedy by action against him (*t*); it is therefore im-

(*p*) Prac. Reg. 121.
(*q*) Hind. 305.
(*r*) Campbell v. Scougall. 19 Ves. 553.
(*s*) Newton v. Foot, 2 Dick. 793; Newte v. Foot. 2 Ch. R. 393. S. C. semble; Cooke v. Wilson, 4 Mad. 380.
(*t*) Hind. 360.

In England.

portant, before any person is named as a Commissioner, that the person naming him should ascertain whether he is willing to act.

A Commissioner refusing to act might, in all probability, be proceeded against for a contempt of the Court, if without excuse, but doubtless they will not punish a person for it unless his reasonable expenses be allowed (*u*).

Commission how made out.

The Commissioners' names being struck, the Clerk in Court of the party suing out the commission, (the order for it, duly passed, entered and served, being previously left with him,) inserts the Commissioners' names therein. The form of a joint commission, is as follows:—

Form of joint commission.

Where more than one set of defendants.

When sued out by defendant.

'VICTORIA, *by the grace of God, &c. To A. B., C. D., E. F., and G. H., greeting: Know ye that we, in confidence of your prudence and fidelity, have appointed you and by these presents do give unto you, any three or two of you*, [or, if there are several sets of defendants, *any two or more of you,*] *diligently to examine all witnesses whatsoever upon certain interrogatories to be exhibited to you, as well on the part of* John Doe, *complainant, as on the part of* Richard Roe, *defendant, or of either of them,* [or, where the commission is sued out by the defendant, *as well on the part of* Richard Roe, *defendant, as on the part of* John Doe, *complainant, or of either of* them,] *and therefore we command you, any three or two of you,* [or *any two or more of you,*] *that at certain days and places to be appointed by you for that purpose, you do cause the said witnesses to come before you, and then and there examine each of them apart upon the said interrogatories on their respective corporal oaths, first taken before you, or any three or two of you, upon the Holy Evangelists. And that you do take such their examinations and reduce them into writing on parchment, and when you shall have so taken them, you are to send the same to us in our* Chancery, *on* [insert return] *wheresoever it shall then be, closed up and under your seals or the seals of three or two of you,* [or *of two or more of you,*] *distinctly and plainly set together with the said interrogatories and this writ.* And we further command you, *and every of you, that before you act or*

(*u*) Hind. 360.

be present at the swearing or examining any witness or witnesses, you do severally take the oath first specified in the schedule hereunto annexed. And we do give you, any three, two, or one of you, [or *any one or more of you,*] *full power and authority jointly or severally to administer such oath to the rest or any other of you upon the Holy Evangelists.* And we furthur command *that all and every the Clerk or Clerks employed in taking, writing, transcribing, or engrossing the deposition or depositions of witnesses to be examined by virtue of these presents, shall before he or they be permitted to act as Clerk or Clerks as aforesaid, or be present at such examination, severally take the oath last specified in the said schedule annexed. And we also give you, or any three, two, or one of you,* [or *any one or more of you,*] *full power and authority jointly or severally to administer such oath to such Clerk or Clerks upon the Holy Evangelists.*' Witness, &c.

In England.

This commission is endorsed '*By order of the Court,*' and a label is attached, in the following form:—

Label.

'*To A. B., C. D., E. F., and G. H., any three or two of them,* [or *any two or more of them,*] *a commission to examine witnesses, as well on the part of* John Doe, *plaintiff, as on the part of* Richard Roe, *defendant, returnable* [day of return] *on fourteen days' notice to the defendant.*'

The schedule contains the following forms of oaths, printed upon parchment, to be administered to the Commissioners and to their Clerks:—

Commissioners' oath.

'Commissioners' oath:—*You shall, according to the best of your skill and knowledge, truly, faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission hereunto annexed, upon the interrogatories now produced and left with you; and you shall not publish, disclose, or make known to any person or persons whomsoever, except the Clerk or Clerks by you employed, and sworn to secrecy in the execution of this commission, the contents of all or any of the depositions of the witnesses, or any of them, to be taken by you and the other Commissioners in the said commission named, or any of them, by virtue of the said commission,*

In England.

until publication shall pass by rule or order of the High Court of Chancery:—So help you God.'

Clerk's oath.

The Clerks' oath:—*You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take and write down, transcribe and engross, the depositions of all and every the witness and witnesses produced and examined by the Commissioners, or any of them, named in the commission hereunto annexed, as far forth as you are directed and employed by the said Commissioners, or any of them, to take, write down, transcribe or engross the said depositions, or any of them. And you shall not publish, disclose, or make known, to any person or persons, whomsoever, the contents of all or any of the depositions of the witnesses, or any of them, to be taken, wrote down, transcribed, or engrossed by you, or whereto you shall have recourse or be in any wise privy, until publication shall pass by rule or order of the High Court of Chancery:*—So help you God.'

Return, —under the old practice.

Under the old practice of the Court, commissions for the examination of witnesses were returnable on a general return day, or any day certain in term; and they were not unfrequently made returnable *without delay*, which return, if the commission was made out in term time, held to the first return of the ensuing term; and if made out in the vacation, to the last return of the subsequent term (*x*); but, by the 17th Order, a plaintiff requiring a commission to examine witnesses must not only, as we have seen (*y*), obtain and serve an order for such commission within three weeks from the filing of his replication, but such commission must be returnable, *at the latest, on the first return of the second term then next following* (*z*).

—under the 17th Order of 1831. Where plaintiff sues out commission.

Where defendant sues out commission under 17th Order.

By the same Order, if the plaintiff serve a *subpœna* to rejoin within three weeks after filing his replication, but does not obtain and serve an order for a commission, so that the defendant is at liberty to obtain an order for a commission, such commission must be returnable at the like period as the plaintiff's commission would have been returnable in case he had served the order for one within the proper time. And where a plain-

(*x*) Hind. 302.
(*y*) Ante, p. 379.
(*z*) Ord. XVII. 1831.

tiff, having sued out a commission, neglects to execute and return the same at or within the time stated in the 17th Order, so that the defendant is entitled to a new commission, the return of such new commission must be on the last return of the term following that which is allowed to the plaintiff by the 17th Order for the return of his commission.'

In England.

Where the defendant sues out a commission under any of the other circumstances before mentioned, as entitling him to do so, the return of such commission must be regulated by the old practice; with reference to which it may be observed, that if a commission in England be taken out in vacation and has not a certain return, but only *sine dilatione* it does not expire on the first day of the following term, but may be continued in execution during the whole of the next term to the last return (*a*).

Not under the 17th Order.

Effect of a return without delay.

Care must be taken to have the commission executed before the expiration of the day of return, as the Court itself has not power to extend the time for the return of a commission, unless by consent. A commission, however, which was executed after four o'clock in the afternoon on the day on which it was returnable, was held to have been regularly executed (*b*).

Formerly commissions could not be executed in term time without leave of the Court, the reason given for which is, that the Commissioners being generally country attornies, it was probable that they would be in town attending the term on their other clients' affairs, and consequently could not attend upon the execution of the commission (*c*); but, by the 17th Order of 1831, all commissions sued out pursuant to that or the preceding Order may be executed in term time, and publication is to stand enlarged until the commission be returnable.

May be executed in term.

The commission for the examination of witnesses having been prepared, is sealed in the same manner as a commission to take a plea or answer, &c. (*d*), and is then sent by the Clerk in Court who has prepared it, to the Solicitor by whom he is employed.

Sealing and delivery.

(*a*) Barnsley v. Powell, 3 Atk. 593. Vide Jones v. Mitchell, 2 Vern. 197, *contra*.

(*b*) Moreton v. Moreton, 1 Dick. 21.

(*c*) For. Rom. 135.

(*d*) Ante, p. 287.

In England.

Carriage of commission.

It is to be observed, that the party suing out a commission is entitled to the carriage of it, but that if he loses it, or commits any gross abuse in the execution of it, so that it is necessary to have the commission renewed, the carriage of the new commission is generally entrusted to the other side (*e*).

Manner of executing commis-

The Solicitor of the party suing out the commission, having received the commission, apprizes *his own* Commissioners of the nature and method of proceeding upon it, and keeps it unopened until the day appointed for its execution.

Notice of execution;

The time and place of executing the commission being settled among themselves, the Solicitor for the party who has the carriage of it must procure a notice in writing, to be subscribed by two of his Commissioners, appointing the time and place of execution, and directed to those parties to whom, by the label of the writ, notice is directed to be given (*f*).

—to whom given.

If the label directs notice to be given to a person you cannot find, you may, on motion or petition, obtain an order for a Master to appoint a time and place for opening the commission (*g*).

Service of.

This notice in writing must specify the title of the cause, the time when, and the place where, the execution of the commission is appointed to be held; and it must not only be served upon the adverse Commissioners, but it must also be served upon all the parties joining in the commission, personally, or left at their respective dwelling-houses or places of residence, with one of the family, *ten days*, in the *Easter Vacation*, and *fourteen days* in any *other vacation*, previous to and exclusive of the day appointed for the execution of the commission. In this respect it differs from the notice of the execution of a commission to take an answer, which need only be served upon the Commissioner named in the label (*h*).

Form of notice.

The form of the notice of the opening of a commission to examine witnesses, may be the same, *mutatis mutandis*, with that used upon the opening of a commission to take an answer (*i*).

(*e*) Hind, 303; Prac. Reg. 83.
(*f*) Hind. 334.
(*g*) 1 Harr. (Ed. Newl.) 246.
(*h*) Ante, p. 288.
(*i*) Vide ante, ib.

Where the commission is *exparte*, no notice of its execution to the other side is necessary (*k*).

In England. Where commission *exparte*.

The time and place of opening a commission having been appointed, the next thing to be done is to secure the attendance of the witnesses. This may be effected by summons from the Commissioners, unless it is supposed that the witness will not attend voluntarily, in which case a subpœna *ad testificandum* must be resorted to.

Attendance of witnesses.

The summons must be entitled in the cause, and may be in the following form:—

Form of summons.

'*Whereas we have received a commission issuing out of and under the seal of the High Court of Chancery, to us and to others therein named directed, for the examination of witnesses in a cause in the said Court depending between* John Doe *and others, plaintiffs, and* Richard Roe *and others, defendants; and whereas we are informed that you whose names are hereunder written are material witnesses for* [the plaintiffs or the defendants]; *we therefore, by virtue of the commission, will and require you and every of you, severally and personally, to be and appear before us, the said Commissioners, or any two or more of us, at the house of* , *known by the name or sign of* , *situate in* , *in the* *of* , *on* , *the* *day of* *instant, at the hour of* *in the* *noon, to testify the truth, according to the best of your knowledge, for and on behalf of the said* [plaintiffs or defendants]; *and you are then and there to attend, and not to depart until you have been examined on the part of the* [plaintiffs or defendants]; *and herein you are not to fail.* Dated,' &c. (*l*).

If the production of a document is required, a notice to produce it must be added to the summonses in the same form as the *duces tecum* clause in a subpœna.

These summonses must be signed by two or more of the Commissioners, and directed to the witnesses by name, and they must be served upon each witness by shewing him the original summons, and leaving a copy with him, a reasonable time before the execution of the commission, with one shilling

(*k*) 1 Harr. (Ed. Newl.) 244. (*l*) Hind. 336.

In England.

conduct money (*m*). But if a witness resides at any great distance from the place where the commission is to be executed, his reasonable expenses must be paid or tendered to him, otherwise he is not bound to appear; nor, if he appears, is he bound to give evidence until his reasonable expenses are actually paid or tendered to him (*n*).

No process of contempt lies upon a disobedience of this summons, no writ under seal being directed to the witness; and therefore it is that a summons should be served upon those witnesses only whose attendance can be depended upon (*o*).

Subpœna *ad testificandum.*

A subpœna *ad testificandum* before Commissioners is in the same form as a subpœna *ad testificandum* before the Examiner (*p*), save that instead of commanding the attendance of the witness before the Examiner, it commands his attendance '*before* A. B. *and others, Commissioners appointed for the examination of witnesses in our Chancery, at such time and place as the bearer hereof shall, by notice in writing, appoint*' (*q*).

Service of, &c.

The regulations as to suing out the writ, and for serving it, and the notice accompanying it, are the same as those already pointed out with reference so a subpœna *ad testificandum* before the Examiner (*r*). It must also be accompanied by a similar notice of the time and place of attendance.

Obedience to, how enforced.

If the witness, having been duly served with the subpœna and notice, neglects or refuses to appear, or, having appeared, refuses to give evidence or sign his deposition, &c., an order may be obtained for the witness's attendance, at his own expense, to be sworn and examined *before the Examiner,* within four days, or that he may stand committed, &c., in the same manner that such an order is obtained upon a witness making default in his attendance before the Examiner (*s*); and the same

(*m*) Hind. 336

(*n*) Ibid. 337.

(*o*) Ibid. It is suggested, in the same work, that the Court, in aid of the Commissioner's summons, might, upon disobedience to it, so far interpose as to make an order for the witness to attend at the examination for the purpose of being examined, &c.; but this seems to be doubtful; and the safest way, where there is any doubt of the witness's attendance, is to serve him with a subpœna.

(*p*) Ante, p. 475.

(*q*) Ord. 1833, Appx.

(*r*) Ante, p. 475.

(*s*) Ante, p. 476; Hind. 339, 340.

compulsory line of process may then be gone through to enforce obedience to the order (*t*).

In England.

If a witness, served with a subpœna *duces tecum*, refuses to produce the document mentioned in the subpœna upon being required to do so by the Commissioners (*u*), an application may be made to the Court by motion, when, if the witness shews no sufficient ground for withholding the production, an order will be made that he attend again before the Commissioners, and produce it, and pay the plaintiff the costs occasioned by his previous refusal (*x*).

Where witness refuses to produce a document.

The Commissioners and witnesses having met at the time and place appointed by the notice for the execution of the commission, the commission, which till that time must remain sealed, may be opened and read by the commissioners to see their authority (*z*). Although four or more Commissioners are named in the commission, one Commissioner attending on each side is sufficient (*a*); and it is to be observed, that where a party merely joins in commission for the purpose of cross-examination, he will be allowed, on the taxation of costs, for the attendance of one Commissioner, only (*b*). It is not, however, necessary, provided two Commissioners attend, that there should be one appointed by each party; and to obviate any inconvenience which may arise in case no Commissioner attends on behalf of the adverse party, the party having the carriage of the commission should secure the attendance of both his own Commissioners, for no less than two can proceed upon and return the commission (*c*). And where one Commissioner met on each side, and the plaintiff's Commissioner went away without doing any thing, the commission was lost. The Court, how-

Attendance of Commissioners;

—two sufficient;

—need not be one appointed by each party.

(*t*) Ante, p. 476; Hind. 339, 340.

(*u*) Bradshaw v. Bradshaw, 1 Russ. & M. 358. Commissioners are entitled to demand the production of the document by the witness, although there is no interrogatory as to the fact of his having it in his possession.

(*x*) Bradshaw v. Bradshaw, ubi supra.

(*z*) Hind. 342.

(*a*) Ibid.

(*b*) 1 Smith's Ch. Pr. Ed. 1838, 363

(*c*) Hind. 342.

In England.

ever, ordered the plaintiff to pay the defendant his costs, and granted a new commission, of which the defendant was to have the carriage(*d*).

Two appointed by same party may proceed *exparte*.

If the two Commissioners of the party having the commission attend at the time and place appointed for the execution of it, they may proceed *exparte*, although neither of the Commissioners on the other side attend.

In this respect there is a difference between the party having the carriage of the commission and the other; for if the party having the commission does not attend, the Commissioners on the other side, although they may both be there, cannot proceed for want of the commission. It is upon such occasions that a duplicate commission is of use, for, if the party whose Commissioners attend have a duplicate, they may proceed to execute it *exparte*.

Duplicate commission, when useful.

It is to be noticed, that if there is no duplicate commission, and the defendant's Commissioners attend at the time and place appointed, and none appear for the plaintiff, the party aggrieved is to be recompensed in costs(*e*), and he is entitled, under the 17th Order (*f*), to have an order for a commission returnable on the last return of the term following that which is allowed to the plaintiff by the same General Order for the return of his commission(*g*); and in that case he will have the carriage of the commission himself.

Where, after commission opened, the other party takes it away,

Although it is necessary that the commission, or a duplicate of it, should be produced at the opening; yet, after it has been opened, the reproduction of it is not absolutely necessary; and, therefore, where a joint commission had issued to examine on both parts, directed to three, four, or two Commissioners, and three met and examined witnesses, and appointed a new day to examine more, but the defendant's Commissioner took up the commission and carried it away, and came not at the day appointed, whereupon the plaintiff's Commissioners, having come, continued the examination of witnesses, without having the commission, and certified them, together with the former depositions and the whole matter, to the Court; the Court or-

(*d*) For. Rom. 130.
(*e*) Hind. 343.
(*f*) Ord. 1831.
(*g*) Ante, p. 491.

In England.

dered the depositions certified to be sealed up again and to remain in Court, and awarded a *subpœna duces tecum* against the Commissioner to bring in the commission, &c. (*h*). This was done in order that he might bring in the authority by which the Commissioners had acted in taking the depositions; upon which, if it should appear that they had a proper authority, the not having the commission before them would not have invalidated the depositions (*i*).

—or return it too soon.

The same principle was acted upon by the Court of Exchequer in a recent case (*k*), where, upon a commission to examine witnesses abroad, the plaintiff's Commissioners, having examined their witnesses, closed the commission, and returned it, under a misapprehension that the defendant had no witnesses to examine; whereupon the defendant, after the commission had been sent off to England, examined his witnesses before some of the Commissioners, and the depositions of such witnesses were sealed up and sent to England; on a motion being made for liberty to annex the depositions of the defendant's witnesses, and the interrogatories upon which they were founded, to the commission and depositions on the part of the plaintiff, the Court, Sir W. Alexander, L. C. B., expressed an inclination to grant a new commission, unless the plaintiff would consent to the motion; and, upon the plaintiff's consenting, made the order.

Adjournment of commission;

—in what cases dispensed with.

After a commission has been once opened, it must, if the business cannot be completed, be regularly adjourned, otherwise the commission will be lost, except the other side agree to the adjournment or to take fresh notice (*l*); but if the commission be not opened, and he who has the carriage of it gives fresh notice, and then executes it, this is a sufficient execution, unless in the mean while, the adverse party has obtained and served an order, which he may do, to stay proceedings until the costs of the former day's default are paid (*m*).

A commission may be adjourned after it has been opened,

(*h*) Prac. Reg. 126.

(*i*) For. Rom. 132.

(*k*) Irving v. Viana, 1 Y. & J. 416.

(*l*) It is said that this does not apply to an adjournment from one day to the next. Vide 1 Smith's Ch. Pr. 369.

(*m*) Hind. 353; Prac Reg. 122.

In England.

May take place, though time and place of opening appointed by Master.

even though the time and place of opening it, may have been appointed by the Master; because the appointment of the Master is only to direct the day and place of opening it. Therefore, if the Commissioners agree, they have, notwithstanding such appointment, authority to make proper adjournments (*o*).

Not to be resorted to without necessity.

The fair course of proceeding, however, is not to adjourn without necessity; the examination should be completed as far as it can be done *uno actu*, that there may be as little opportunity as possible to divulge the depositions (*p*); and it seems, that if the plaintiff or his Commissioners abuse the carriage of the commission by making unnecessary adjournments, or an irregular examination of witnesses, such a proceeding may entitle a defendant to have a commission of his own and the carriage of it (*q*).

Should be mentioned in the title of the depositions.

When an adjournment is made, if any witness be examined, the time when, and place where, such examination is taken, ought to be described and mentioned in the title of the depositions, and a memorandum or entry of such adjournment made thereon, which the acting Commissioners should sign, because, upon an indictment for perjury, committed in deposing falsely before Commissioners, it is essential to state the time and place where the deposition was taken, because, *prima facie*, it must be intended to have been where the title of the depositions imports (*r*).

Interrogatories must be produced,

—before Commissioners are sworn.

As soon as the commission has been opened and read, both parties must, if they intend to examine witnesses, exhibit their interrogatories, as well those intended for cross-examination as those for examination in chief. For the reason which has been before stated (*s*), these interrogatories must be produced to the Commissioners before they are sworn; after the Commissioners have been sworn, no new interrogatories can be exhibited without an order of the Court (*t*). If the Commissioners on both sides attend the execution of the commission, and one side examines, and the other side neither examines nor puts in interrogatories, he shall never afterwards

(*o*) Browne v. Vermuden, 1 Ch. Ca. 282; Hind. 352.

(*p*) Ibid 353.

(*q*) Hind. 353.

(*r*) Ibid.

(*s*) Ante, p. 473.

(*t*) Ante, p 479.

In England.

examine, unless upon special order made upon good cause shewn (*u*). So where a defendant has joined in commission, and his Commissioners do not attend, or if, upon due notice being given, one side proceeds and examines his witnesses, the other side, if he does not examine, shall not have a new commission, unless upon affidavit made of some reasonable cause of non-attendance (*x*).

Commissioners must take and administer the oath.

The Commissioners having opened the commission, administer the oath to each other, in the form specified, in the schedule to the commission, they then administer the Clerk's oath, specified in the same schedule, to the several Clerks who are employed in taking, transcribing, writing, or engrossing the depositions of the witnesses to be examined (*y*).

If Commissioner a witness, must be examined before swearing.

It is to be noticed here, that a Commissioner may be examined as a witness under the commission, but the other Commissioners have no power to enforce his attendance for that purpose (*z*). If a Commissioner is so examined, his examination should be taken by the other Commissioners before he is sworn as Commissioner, or any other witness has been examined in his presence, otherwise his examination will be irregular, and his deposition may be suppressed (*a*).

If, from any circumstance, the examination of a Commissioner should become necessary, after he has been present at the examination of the other witnesses, application should be made to the Court for leave to examine him. The Court, however, is very cautious in making such an order, and where, owing to the sudden illness of a witness for the plaintiff, he had been rendered incapable of giving evidence, in consequence of which, the examination of one of the plaintiff's Commissioners, had become absolutely necessary, in order to enable him to establish his right; the L. C. Baron, (Alexander,) although he gave permission to examine the Commissioner, directed that his examination should be confined to the proof of two receipts for rent (*b*).

(*u*) Richardson v. Louther, 1 Ch. Ca. 174; Hind. 355; Mineve v. Row, 1 Dick. 18; sed vide Earl of Coventry v. the Countess of Coventry, ibid. 25.

(*x*) Hind 355.

(*y*) Hind. 344.

(*z*) 2 Roll. Rep. 90.

(*a*) Prac. Reg. 125.

(*b*) Grubb v. Grubb, 1 Y. & J. 36.

In England.

Etiam a Clerk to the Commissioners.

The same rule applies to the Clerk to the Commissioners; therefore, if it be necessary to examine the Clerk to the Commissioners as a witness, he must be examined before he is sworn as Clerk (*c*), or at least, before any other witness has been examined.

The circumstance of a Commissioner or a Clerk having been examined as a witness, will not prevent him from afterwards acting in the commission.

Commissioners not to confer with either party.

After the examination is begun, the Commissioners ought not to confer with either party, touching the examination, or to take new instructions concerning the same, and if they do so, it will be a great misdemeanor, and punishable by fine and imprisonment (*d*).

—should sign interrogatories.

The oaths having been administered, the Commissioners attending are to subscribe their names to the foot of each schedule of interrogatories respectively (*e*).

Title of depositions.

The title of the depositions, preparatory to the examination of witnesses, is then written upon paper thus:—

'*Depositions of witnesses, produced, sworn, and examined, on , the day of , in the year of Queen Victoria, and in the year of our Lord* 18 *, at the house of , called or known by the name of the , in , in the of , by virtue of a commission issuing out of Her Majesty's High Court of Chancery, to us A B., and C. D., and others directed, for the examination of witnesses, in a cause there depending between* John Doe *complainant, and* Richard Roe *defendant; we the acting Commissioners, under the said commission, and also the respective Clerks by us employed in taking, writing, transcribing, and engrossing the said depositions, having first duly taken the oaths annexed to the said commission, according to the tenor and effect thereof, and as thereby directed, on the part and behalf of the complainant* John Doe' (*f*).

The Commissioners then call a witness before them, all other persons being ordered to withdraw during the examina-

(*c*) 1 Harr. Ed. Newl. 274-5.
(*d*) Hind. 348, cited 4 Inst. 278.; 9 Rep. 70; Cro. Jac. 65; Yelv. 62.
(*e*) Hind. 315.
(*f*) Ibid.

tion, so that the Commissioners, their Clerks, and the witnesses to be examined, may be left together in one room (*g*); one of the Commissioners producing the interrogatories, takes them in his hand, and reads the title of them to the witness to be examined, and then administers the oath to him. The form of the oath, is the same as that administered by the Examiner (*h*); but it may be varied as the case may require, and the substance turned into an affirmation for a witness who is a Quaker (*i*), or otherwise entitled to give evidence upon affirmation, instead of oath (*j*).

In England.

Commissioner not qualifying must withdraw.

Form of oath.

A witness must first be examined upon the interrogatories of the party who produces him, and then, forthwith, without suffering him to go abroad, upon the cross-interrogatories, on the other side (*k*),—these interrogatories, like the interrogatories in chief, ought, in strictness, to have been delivered before the Commissioners were sworn; but, as we have seen, a party who has omitted to deliver cross-interrogatories in proper time, may procure an order for liberty to add interrogatories to those already exhibited by him (*l*).

Examination of witness.

The course of proceeding, with regard to the examination of a witness who does not understand the English language, is the same as that to be pursued, where the witness is to be examined before an Examiner (*m*).

Where a witness does not understand English.

The party suing out the commission has a right to examine the first witness. Previously to the examination of each witness, the Solicitor for the party for whom he is to be examined, prepares a note containing the name, rank, or occupation, age, and place of abode of the witness, and of the several interrogatories to which he is to be examined. This notice is to be delivered to the Commissioners; at the same time that the witness is sent in to them; a similar note is usually sent to the Solicitors for the other parties, that they may have the witness cross-examined if they think proper (*n*).

Party suing out commission to examine first.

(*g*) If a Commissioner refuses to qualify, he ought not to remain in the room. Shaw v. Lindsey, 15 Ves. 380-4

(*h*) Ante, p 481

(*i*) Hind. 316.

(*j*) 7 & 8 W 3, c. 34; 3 & 4 W. 4. c. 49; 1 & 2 Vict c. 77.

(*k*) Hind. 346.

(*l*) Ante, p. 473, Carter v. Draper, 2 Sim. 52.

(*m*) Ante, p. 481.

(*n*) 1 Newl. Ch. Pr. 267.

In England. Form of deposition.

The witness being sworn, his name, description, address, and age, are written under the title of the depositions, thus:— *E. F. of ———, in the ——— of ———, Esq., aged ——— years, a witness produced, sworn, and examined on the part and behalf of the complainant John Doe, deposeth and saith as follows.*

The answer given by the witness to each interrogatory, is reduced into writing, in the following form:—

1st. *To the first interrogatory this deponent saith as follows*, &c.; then must follow the substance of the deposition. It is to be remarked here, that although the statute 3 & 4 W. 4, c. 94, s. 27, directs that all depositions of witnesses examined in the High Court of Chancery, shall be taken in the first person, this has been held to apply to depositions taken in Court, (*i. e.* by the Examiners only,) and not to depositions taken by commission (*n*).

Where witness cannot depose.

If a witness cannot depose to any matter contained in an interrogatory, the deposition must be taken down in these words—'*to such an interrogatory this examinant cannot depose*' (*o*).

Proceeding where witness refuses to be examined.

If a witness, upon being produced before the Commissioners, demurs or objects to being examined, the Commissioners may return the objection with the commission, which will be disposed of in the manner pointed out in the following section.

Party to the cause.

A party in the cause cannot, as has been stated, be examined without an order, which must be produced to the Commissioners before his depositions are taken (*p*),

Rules and regulations as to examinations.

The Commissioners should themselves examine the witnesses and not leave so weighty an affair to their Clerks or others (*q*). The same rules and regulations which have been before pointed out as proper to be observed in conducting the examination of witnesses before the Examiner should be observed by the Commissioners at the execution of a commission to examine witnesses (*r*). In addition to which, it may be stated, that the Commissioners are bound only to examine wit-

(*n*) Ante, p. 484, n. (y).

(*o*) Beames's Ord. 190; Ante, p. 482.

(*p*) Ante, p. 460.

(*q*) Prac. Reg. 124; Hind. 348.

(*r*) Vide, ante, p. 482 *et seq.*

nesses to those interrogatories or parts of interrogatories to which they are called upon to examine them (*s*), they are not, however, to judge what interrogatories are pertinent and what are not, but are to examine upon the interrogatories as they find them (*t*); they are at liberty, however, to exercise some discretion as to what is, or is not, legal evidence, but in doing so they must be very careful that, in rejecting any thing, they do not incur the danger of rejecting too much (*u*). The Commissioners must also be careful not to take down from a witness matters reflecting upon the character of any of the parties, unless the interrogatory leads to it. And where a witness, examined under the last general interrogatory, had deposed several things, reflecting upon an individual, which the Commissioner took down, Lord Hardwicke discharged an order, by which the witness was directed to pay the costs, because it was the Commissioner's fault to take down any deposition that was scandalous and impertinent (*x*).

In England.

Depositions to be read over to witness,

The deposition of each witness, after it has been taken down, should be carefully read over to him, or he should be permitted to peruse and consider what he has deposed; and if, upon such revision, any errors appear, or the witness, upon recollection, objects to the statement or penning of the depositions, the same must be rectified (*y*). A witness, while he is before the Commissioners, may correct his testimony in the same manner as a witness before the Examiner; but after he has left the Commissioners, he cannot come again for that purpose (*yy*).

—and subscribed by him on paper drafts,

The witnesses must severally subscribe their Christian and sirnames or marks to the paper drafts of their respective depositions, and where a witness dies after he has been examined, but before he has signed his depositions, they cannot, as we have seen, be read (*z*).

—and also on engrossment.

If the day appointed for the return of the commission should arrive before the examination of all the witnesses has

(*s*) Whitelocke v. Baker, 13 Ves. 511.

(*t*) Baker v. Cole, 2 Swanst. 207 (n).

(*u*) Whitelocke v. Baker, ubi supra.

(*x*) Anon. 2 P. Wms. 406.

(*y*) Hind 319; Prac. Reg. 125.

(*yy*) Lord Abergavenny v. Powell, 1 Mer. [illegible].

(*z*) Ante, p. [illegible]

In England.

been completed, the commission, &c., must be closed and sealed up; and the party wanting it should apply for a renewed commission, or he may, *by consent*, obtain an order to extend the return of the commission (*a*).

After the paper drafts of the depositions have all been signed, the whole are engrossed or copied upon parchment by the Clerks attending, each witness subscribing his name to his own depositions thus engrossed (*b*). It is said, however, that if the original deposition be signed by the witness, it is not essential that the signature to the engrossment should be in his own hand (*c*).

Exhibit how endorsed.

Where a book, deed, paper, or other exhibit is proved, the following endorsement, (without which it cannot be read at the hearing,) containing the title of the cause, &c., is written upon the exhibit produced, two or all of the acting Commissioners before whom the same was proved subscribing their names to the endorsement thus:—

In Chancery.

Between John Doe, ... Plaintiff,
and
Richard Styles, Defendant.

16 *August*, 1838. *At the execution of a commission for the examination of witnesses in this cause, this paper writing was produced, and shewn to R. S., a witness sworn and examined, and by him deposed unto at the time of his examination on the complainant's behalf,* [if two or more witnesses prove the same exhibit, add, for each witness,] *and was also produced and sworn unto, &c., a witness, &c., before us.* A. B.
C. D. (*d*).

Return to commission.

The depositions of witnesses engrossed, as before mentioned upon parchment, must be carefully examined and compared with the paper drafts, and when the engrossment is, upon such examination, found to be a true copy of the original depositions, two, (generally all,) of the acting Commissioners subscribe their names to each skin of parchment, if more than one. The depositions thus eng ossed upon parchment and signed, are then,

(*a*) 1 Smith's Ch. Pr. Ed. 1838, 369.
(*b*) Hind. 349.
(*c*) 1 Smith's Ch. Pr. 369 n.
(*d*) Ibid. 350.

together with the interrogatories, to be annexed to the commission with the schedule of oaths, and a return is then endorsed upon the commission, near the middle, in the following form:—

In England.

'*The execution of this commission appears in a certain schedule* (*or in certain schedules*, if more than one,) *hereto annexed.*'

This return is made by two or more, (generally all,) of the acting Commissioners who must subscribe their names thereto (*e*).

Consequence of a false return.

Commissioners making a false return, *e. g.*, by certifying that a witness was examined upon oath, who was never examined, are finable (*f*).

Where Commissioners act irregularly or obstruct each other.

If any of the Commissioners obstruct the others in their examination, or examine irregularly, such misbehaviour or whatever else it may be necessary to communicate to the Court, may be certified by the Commissioners in the return of the commission. This may be done without affidavit, because, being officers of the Court, they are allowed to certify; but it seems, that a party wishing to avail himself of such certificate, must make an application supported by affidavit of the fact, otherwise the Court will not take notice of the Commissioners' certificate alone, because they are appointed for another purpose, and are not to certify but of necessity (*g*).

Commission how folded and sealed.

The commission, together with the oaths, interrogatories, and depositions annexed, must then be neatly and carefully folded, so that no part of the engrossment or writing may be read; and, being so folded, and bound with red tape or string, in such a manner that the label of the commission only may appear to view, and hang out therefrom, the acting Commissioners set their seals in the several meetings or crossings of the tape or string; and, upon some place on the outside of the commission, they subscribe their names (*h*).

Disposition of paper drafts.

After the commission has been thus executed and made up, the paper drafts of the depositions of the respective witnesses, for each party, should be carefully sealed up and delivered to some of the acting Commissioners, for safe custody. These

(*e*) 1 Smith's Ch. Pr. 350.
(*f*) Hind. 358; Cro. Eliz. 623.
(*g*) Hind. 358.
(*h*) Ibid. 351.

In England.

paper drafts are sometimes divided into two parts, and the parts so divided, interchangeably, kept by the Commissioners for the respective parties; but the most usual way is for the plaintiff's and defendant's Commissioners, respectively to keep the drafts of the adverse party's witnesses, taking care that no person see them until publication has passed in the cause (*i*).

Commission how sent up,

—by Commissioner,

—or by Messenger.

The commission having been made up in the manner above directed, with the label hanging therefrom, must either be delivered by one of the Commissioners personally into the hands of the Clerk in Court, who made it out, or of his Agent at his seat in the Six Clerk's Office; or it may be delivered by one of the acting Commissioners into the custody of a careful person, with instructions to carry and deliver the same personally into the hands of the Clerk in Court or his Agent. It will also be proper to apprize such person of the oath which will be required of him upon delivery of the commission (*k*).

Messenger's oath.

When the commission is brought by a Messenger, the Clerk in Court to whom it is delivered, must, as soon as it arrives, and previously to its being delivered, take the bearer to the sitting Master at the Public Office, or to any other Master in his absence, before whom the bearer must make oath '*that he received the commission from the hands of one or more of the Commissioners therein named, and that it has not been opened or altered since he received it;*' an endorsement is then made upon the commission thus:—

Endorsement,

8 *Nov.* 1837, *upon the oath of T. P.*
before Edmund Dowdeswell.

—where brought by Commissioner,

—where oath is dispensed with.

If a Commissioner brings the commission, no oath is required of him, and the endorsement upon the commission then is—'8 *Nov.* 1837, *received by the hands of A. B., Esq., one of the Commissioners.*' (*l*) If the other party will consent to waive the oath of the Messenger, the depositions must be sent up to the town Agent, and by him left with his Clerk in Court, who will procure the opposite Clerk in Court to endorse them as *received without oath of Messenger.*' (*m*)

(*i*) Hind. 351.
(*k*) Ibid.
(*l*) Hind. 352.
(*m*) 1 Smith's Ch. Pr. Ed. 1838, 370.

In England.

Where a commission having been executed and sealed, &c., was delivered to a Messenger who, by accident, lost it on the road, where it was picked up by two travellers, who brought it to one of the Masters; upon their affidavit that they had not opened or altered the same, the Court made an order that the depositions should be received and deposited in the hands of the Six Clerk, and a rule to publish entered thereupon as if the depositions had been regularly returned (*n*).

Where commission has been lost.

Where a commission to examine *de bene esse* and the depositions returned were completely lost, an order was made that the Commissioners, in whose custody the paper drafts of the depositions remained sealed, should return the same unopened, and that the same should be delivered to the Six Clerk unopened, and be engrossed, and that such engrossment should be filed and made use of as the original deposition might have been (*o*).

Not to be opened before publication.

The Clerk in Court or his Agent having thus received the commission, deposits it at his seat in the office and keeps it unopened till publication has passed in the cause (*p*).

Renewed commissions.

In what cases granted.

It has been before stated, that, under the 17th Order of 1831, if a plaintiff sues out a commission, and neglects to execute and return the same at or within the time stated in his order, the defendant is entitled to an order for another commission, returnable at the last return of the term following that which is allowed to the plaintiff by the same order for the return of his commission. This order, it is presumed, will apply to all cases where the commission has been lost through the default or neglect of the plaintiff or his Commissioners. Sometimes, however, where the commission is not lost, but, owing to some neglect or mistake of the party not having the carriage of it, such party has not had the benefit of examining his witnesses under it, the Court will, upon application, supported by proper affidavits, make an order for another or a renewed commission. Thus where the Commissioners closed

Where first lost through default or neglect of plaintiff.

Where first has been returned.

(*n*) Smales v. Chayter. 1 Dick. 99.

(*o*) Jones v. Donithorne, 1 Dick. 352. Vide etiam Burn v. Burn, 2 Cox. 426.

(*p*) Beames's Ord. 111, 221; Prac. Reg. 117.

Of renewed commissions.

the commission before the proper time, without the defendant or his Solicitor being apprized of their intention to do so, Lord Hardwicke directed a new commission to be issued (q). So where the defendant's Commissioners were both prevented from attending by illness, and the Commissioners for the plaintiff therefore proceeded *ex parte*, a new commission was ordered for the defendant to examine his own witnesses (r). In like manner, a second commission was allowed to a defendant for the examination of some of the plaintiff's witnesses as to the fact of their being interested in the suit, upon affidavit by the defendant's Solicitor that he did not learn that any of the witnesses were so interested until after the execution of the former commission, and that, therefore, no interrogatories had been exhibited to any of the witnesses as to their interest in the event of the suit (s).

Affidavit in support of application.

The Court, however, must be satisfied by the affidavits upon which the application is made, that there was some reasonable cause for the party not availing himself of the first commission, and that neither the party who did not examine, nor any for him or by his direction or knowledge, or with his privity or consent, have seen, heard, or been informed of the contents of the depositions taken, or of any part of them, nor willingly will see, hear, &c., till he has examined, or until publication pass (t). It is to be observed, that, in *Barnsley* v. *Powell*, above referred to (u), the depositions under the former commission had been seen, and that Lord Hardwicke, therefore, refused to allow the defendant to exhibit any new interrogatories under the renewed commission for the examination of new witnesses, but restricted him, by the order, to the exhibition of additional interrogatories as to the competency or credit of a former wit-

(q) Barnsley v. Powell, 3 Atk. 593.

(r) Geast v. Barber, 2 Bro. C. C. 1. Vide etiam Richardson v. Louther, 1 Cha. Ca. 273.

(s) Vaughan v. Worrall, 2 Mad. 323.

(t) Geast v. Barber, ubi supra; For. Rom. 130, 131; Hind. 355. This affidavit is necessary even where publication has not passed in the cause; for although a party cannot regularly see the depositions before publication, yet he may have been informed of them from other sources, e. g., by the witnesses themselves, there being nothing to prevent witnesses from communicating their testimony. Vide Boughton v. Pierrepoint, 3 Swanst. 550.

(u) 3 Atk. 593.

ness, and for the cross-examination of such witness, and for the proof of exhibits.

Of renewed commissions.

Costs, where commission has been lost;

By Lord Clarendon's Orders, it is directed, that, where a commission is awarded to examine witnesses, if, by default of him that hath the carriage of the commission, or of his Commissioners, nothing is done, he shall bear all the charges the other side was put unto about that commission, either for fees of Court, bringing or entertaining Commissioners, or otherwise, to be ascertained by the oath of the party or of him that disbursed the money for him, and shall renew the commission at his own charge (*x*). And where one side produceth and examineth all his witnesses, and the other side doth not, but prays a new commission, if it be granted, he shall bear all the charges of the renewed commission, both in Court and in the country, as well for the charge and entertainment of his own Commissioners as of the Commissioners on the other side; and the other side shall be permitted to cross-examine the witnesses produced by him that reneweth the commission, but if he will examine any other witnesses of his own, then he shall bear his own part of the charge; the charges before mentioned to be ascertained by the oath of the party or of him that disbursed the money for him (*y*).

—where commission not lost.

If a commission becomes void by the error of the Clerk in Court who made it out, the costs shall be borne by him and by that side for whom it was taken out or who had the carriage of it (*z*).

Proceedings under.

The proceedings under a renewed commission are the same as those under the first. By Lord Clarendon's Orders, before referred to, it is directed, 'that he at whose instance a commission to examine witnesses, after a former commission *executed and returned*, is once renewed, and he by whose default, or by default of his Commissioners, a former commission *was not executed*, and thereupon it is renewed, shall, at his peril, examine all his witnesses by that renewed commission, or examine

(*x*) Beames's Ord. 191.
(*y*) Ibid. 192.
(*z*) Prac. Reg. 123.

Of renewed commissions.

them in Court by the end of the term wherein that renewed commission is made returnable, without any more or further delay'(*a*).

Commissions not to be discharged; —except for irregularity.

It is said, that a commission once issued cannot be discharged, except for irregularity, which must be certified by the Master upon a reference (*b*). But it seems, that if, from any cause not dependant upon the parties or upon one party more than another, such as disagreement among the Commissioners, the commission cannot be executed, the Court will send down an Examiner into the country (*c*). If, therefore, a disagreement arises among the Commissioners, they ought to certify it to the Court in the manner before pointed out (*d*).

Examiner, when sent down.

Expenses of commission.

With respect to the expenses of Commissioners for the examination of witnesses, the rule is, that the acting Commissioners shall be allowed *one guinea per diem* during the execution of the commission, exclusive of every other expense incident thereto (*e*). The Clerks are, in like manner, entitled to *half a guinea per diem*. The expenses and charges of entertainment, and other matters, are borne by the parties joining in and attending the execution of the commission. The expenses of the witnesses, if required, are always paid by the party producing them before they give evidence (*f*).

The expenses of a commission to examine witnesses may be very disproportionate where one party examines a great many witnesses, and the other party only a few; and were such expenses to be borne by the parties equally, great hardship might be borne by one of them. However, any difficulty of this nature may be obviated, by each party, at the commencement and during the execution of the commission, keeping his own

(*a*) Beames's Ord. 193.
(*b*) Prac. Reg. 122.
(*c*) Ibid. 126; Hind. 358.
(*d*) Ante, p. 515.
(*e*) A *quantum meruit* lies for serving as a Commissioner upon a commission to examine witnesses, though it was objected that he acted by command of the Court *sed non allocatur*, because he is appointed at the nomination of the party, who ought to pay him if he employs him. Stockhold v. Collington, 1 Salk. 330; Carth. 208; Comb. 186.
(*f*) Hind. 359.

Commissioners' Clerks and witnesses separate from the others, and paying for their entertainment and charges only. A witness cross-examined under a commission thus conducted may be kept at the joint expense of both parties examining and cross-examining him; but if a party who insists upon cross-examining a witness needlessly defers the cross-examination, and detains the witness several days for that purpose, the party, examining such witness originally, may pay him his expenses and charges up to the conclusion of his examination in chief, and then the subsequent expense of the witness's detention for cross-examination must be borne by the party detaining him (*g*).

Expenses.

Where a defendant merely joins in commission for the purpose of cross-examination, he is only allowed, on the taxation of costs, for the attendance of one Commissioner (*h*).

Where defendant only cross-examines.

It sometimes happens, that witnesses, whose testimony is important to the parties in the cause, or some of them, reside abroad, or in some place out of the jurisdiction of the Court; in such cases a commission to examine witnesses abroad must be obtained.

Commission abroad.

Commissions of this description may be issued to take the depositions of witnesses in any country. Where the country in which the witnesses reside is at war with this, the usual practice appears to be, to direct it to the nearest neutral port (*i*); but, in *Cahill* v. *Shepherd* (*k*), Lord Erskine made an order for a commission to examine witnesses to be directed to *Seville*, in Spain, although there was then a war between this country and Spain.

May be directed to any country. Where the country in which the witnesses reside is at war with this.

In *Gason* v. *Wordsworth* (*l*), the King of Sweden, to which country a commission was directed, refused to allow it to be executed, unless it was done by some magistrate there, ac-

Where the government of the country refuses to allow the commission to be executed.

(*g*) Hind. 359.
(*h*) 1 Smith's Ch. Pr. 363.
(*i*) —— v. Romney, 1 Amb. 62.
(*k*) 12 Ves. 335.
(*l*) 2 Ves. 325, 326; 1 Amb. 108. S. C.

Abroad.

cording to the laws of Sweden; and Lord Hardwicke refused to direct any other commission into the same country, as there appeared to be no probability that any future commission there could be executed: his Lordship, therefore, ordered the depositions of the witnesses, which had been taken *de bene esse*, to be published (*m*).

Where witnesses reside in India. Proceedings under 13 Geo. 3, c. 63, s. 44.

Where the witnesses to be examined reside in the East Indies, recourse may be had to the provisions of the Statute 13 Geo. 3, c. 63, s. 44, by which it is enacted, 'that when and so often as the East India Company, or any person or persons whatsoever, shall commence and prosecute any action or suit in Law or Equity, for which cause hath arisen, or shall hereafter arise, in India, against any other person or person whatsoever in any of his Majesty's Courts of Westminster, it shall be lawful for such courts respectively, upon motion there to be made, to provide and award such writ or writs in the nature of a *mandamus* or commission to the chief justice and judges of the Supreme Court of Judicature at Fort William, or the judges of the Mayor's Court at *Madras*, *Bombay* (*n*), or *Bencoolen*, as the case may require, for the examination of witnesses; and that such examination, being duly returned, shall be allowed and read, and shall be deemed good and competent evidence at any trial or hearing between the parties in such cause or action, in the same manner in all respects as if the several directions thereinbefore described and enacted in that behalf, were again repeated.'

Statute does not supersede the original power of the Court.

It seems that this act does not supersede the power which the Court had before, of granting commissions, in the ordinary form, to examine witnesses in India (*o*). Where, however, an ordinary commission has been already granted, the

(*m*) Vide Belt's Supplement to Vesey, 357.

(*n*) By the 37th Geo. 3, c. 142, s. 11, the powers, &c., of the Mayor's Courts at Madras and Bombay were transferred to the Recorder's Courts at those presidencies; and by the 40th of Geo. 3, c. 79, s. 5, the powers, &c., of the Recorder's Court at Madras were transferred to the *Supreme Court of Judicature at Madras*; and by the 4 Geo. 4, c. 71, sec. 8, the powers, &c., of the Recorder's Court at Bombay were transferred to the *Supreme Court of Judicature at Bombay*.

(*o*) Murray v. Lawford, 6 Sim. 573.

Court will not make an order for a new one, under this act, without discharging the order for the ordinary commission (*p*).

Abroad.

Besides the ordinary cases in which a commission to examine witnesses abroad is required, for the purpose of obtaining evidence in the suit itself, a commission is also frequently granted for the purpose of enabling the party applying for it, to make use of the testimony of witnesses resident abroad in aid of, or in defence to, an action at law. In such cases, the Bill prays no equitable relief, but is merely a Bill of discovery accompanied by a prayer for a commission to examine witnesses; and if filed by the defendant at law, it prays an injunction to restrain the other party from proceeding at law in the mean time. Some difference exists with respect to the practice as to granting injunctions in these cases and in cases of Bills seeking the relief ordinarily administered in a Court of Equity, which will be noticed in another portion of this work. At present, it is only necessary to observe, that a Bill for the mere purpose of examining witnesses abroad is subject to nearly the same rules as Bills for discovery in aid of an action at law. It has, therefore, been held, that such a Bill will not lie where an action at law has not been actually commenced, and that the Bill must contain an averment that an action has been brought (*q*). But, as we have before seen (*r*), if the Bill requires a commission to examine witnesses in aid of more than one action at law, it will be liable to demurrer, unless where several actions are brought against different underwriters upon the same policy of insurance, so that the actions may come within the rule for the consolidation of such actions by the Court in which they are brought (*s*). To this may be added, that where a commission is wanted to assist in the promotion or defence of an action at law, it must be specifically prayed for by the Bill.

Where evidence is required in aid of trial at law.

Bill for, subject to the same rules as Bill for discovery.

Will not lie where action has not been commenced;

—nor for a discovery in aid of more than one action.

Secus where action may be consolidated.

The Bill also must not only shew that the action has been brought, but it must shew that the facts relied upon as to which evidence is sought, are such as can be made use of either in support of the action or in defence to it; otherwise

Must shew a proper case.

(*p*) Murray v. Lawford, 6 Sim. 573.

(*q*) Angell v. Angell, 1 S. & S. 83.

(*r*) Ante, v. 1, p. 443.

(*s*) Ibid.

Abroad.

the Bill will not lie (*t*). This principle was distinctly asserted by Lord Eldon in *Lousada* v. *Templer* (*u*), in which his Lordship said, 'that though the circumstances were such that even if the plaintiff at law had obtained a verdict, he could not allow him to receive the money until it was ascertained what had been done in *Peru*, yet he would not grant commissions in aid of a defence to an action when he was not satisfied that the facts alleged as a defence would constitute a legal defence to the legal demand. 'The Court,' he added, 'ought never to grant a commission without examining strictly what is the state of the pleadings at law.' Upon the same principle, where a Bill was filed for a discovery in aid of a defence to an action at law brought in this country upon a foreign judgment, the Court allowed a demurrer, upon the ground that a foreign judgment could not be questioned by the Courts here (*x*). But although a foreign judgment cannot be questioned by the Courts here, yet it seems that the nature and effect of the sentence, and the extent of the jurisdiction of the Court by which such judgment was pronounced, may be disputed. In such case the Court will grant a commission for the purpose of examining witnesses as to those points, although it will not permit one to issue to take evidence as to whether a foreign Court has been properly constituted (*y*).

Foreign judgment cannot be impeached here;

—but only the nature of the Court, and the extent of its jurisdiction.

Court may grant commission, although it will not compel a discovery.

It is to be observed, that, although a Bill for a commission to examine witnesses abroad, in aid of or in defence to an action at law, is generally framed as a Bill of discovery, the Court will sometimes grant a commission, although it will not compel the defendant to make the discovery sought, as in cases where the Bill seeks a discovery from the defendant which would subject him to a penalty (*z*), or to prosecution for a libel (*a*).

(*t*) Shedden v. Baring, 3 Anst. 880.

(*u*) 2 Russ. 561, 564.

(*x*) Martin v. Nicolls, 3 Sim. 458.

(*y*) Gage v. Lad Stafford, 2 Ves. 556. Vide etiam Belt's Supplement to Ves. p. 409, where this case is more fully reported.

(*z*) Earl of Suffolk v. Green, 1 Atk. 450.

(*a*) Thorpe v. Macauley, 5 Mad. 218.

Abroad.

Jurisdiction of Court in granting commissions in aid of actions at law not taken away by 1 W. 4, c. 22, s. 4.

The frequency of applications to the Court for commissions to examine witnesses abroad in aid of or in defence to an action at law, has been very much diminished by the Stat. 1 W. 4, c. 22, s. 4, by which the Courts of Common Law are authorized, upon the application of any of the parties to an action depending in such Courts, to order a commission for the examination of witnesses on oath, at any place or places out of their jurisdiction, by interrogatories or otherwise, &c. That statute, however, although it gives the Courts of Common Law, in this respect, a concurrent jurisdiction with Courts of Equity, does not take away the right of the parties to a suit at law, to apply to a Court of Equity for a commission to examine witnesses abroad. And where an action at law had been brought against the plaintiffs in Equity, who in consequence of their witnesses being about to go abroad, applied to the Chief Justice of the King's Bench, under the provisions of the Act, for a commission to examine their witnesses before trial, which his Lordship refused; but gave them leave to have the witnesses examined *viva voce*, before a Gentleman of the Bar, with liberty to the other side to attend and cross-examine; and the plaintiffs in equity, not choosing to avail themselves of such liberty, filed a Bill in Chancery, praying a commission to examine their witnesses in New York, whither they had gone;—the Vice-Chancellor, Sir John Leach, upon application, granted the order for the commission; and his Honor's decision, was afterwards confirmed by the Lord Chancellor upon appeal (*b*). A similar decision was pronounced, by the same learned Judge, in *Baskett* v. *Toosey* (*c*), though the question arose under a different Statute. There, an action was brought by the plaintiff, who was resident at Bencoolen in the East Indies, against the defendant here, and an application was made for a commission to examine witnesses, in support of the action, at Bencoolen; the motion was opposed, upon the ground that, under the Stat. 13 Geo. 3, c. 63, s. 44 (*d*), it was competent to the Court of Law, where the action was brought, to award a writ in the nature of a mandamus, or commission to

Commission granted to Bencoolen.

(*b*) Grinnell v. Cobbold, 4 Sim 546.

(*c*) Mad. & Ge'd, 261.

(*d*) Vide ante, p. 522

Abroad.

the Chief Justices and Judges of the Supreme Courts in India, to take the examination of the witnesses there, but the Vice-Chancellor granted the motion.

—restrained by injunction.

It is to be remarked, that a commission to examine witnesses abroad, in aid of an action at law, is so far considered as a proceeding at law, that an injunction by the Court of Exchequer, obtained by the defendant, to restrain the plaintiff from proceeding in his action, would extend to prevent his suing out a commission in the Court of Chancery; and that where the Court was informed, that such an injunction had issued, Sir John Leach, V. C., did not think it necessary to put the defendant to make any application on the subject to the Court of Exchequer, as this Court would, upon such a motion, notice the proceedings which had taken place in that Court (*e*).

Execution of commission governed by practice in Courts of Equity,

—and not of Law.

But although a commission to examine witnesses abroad, in aid of an action, or of a defence to one, is, to a certain extent, considered as a proceeding at law: yet the Court will not, in the execution of them, depart from its own practice and follow the regulations adopted by Courts of Law with respect to the execution of commissions issuing out of those Courts. Upon this principle, Lord Eldon refused to make an order, that the the plaintiff might communicate to the defendant, the interrogatories exhibited by him under the commission, although the practice of the Courts of Law, in the case of commissions granted by them, required one party to communicate his interrogatories to the other (*f*).

Order for, obtained upon motion and affidavit.

A commission for the examination of witnesses abroad, may be obtained by either party; but, like all commissions for the examination of witnesses, it never issues but by order of the Court (*g*).

This order may be obtained, by motion to the Court, upon notice supported by affidavit (*h*); and it is to be recollected, that

(*e*) Novaes v. Dorrien, 4 Mad. 362.

(*f*) Butler v. Bulkeley, 2 Swanst. 373.

(*g*) Hind 304.

(*h*) It is said that an order for a commission to examine witnesses abroad may be obtained either by motion in Court, or petition to the Master of the Rolls Vide Hinde, 306, but the most usual course appears to be by motion; and where the Bill is for a discovery and prays a commission, that is the only proper proceeding.

the 17th of Lord Lyndhurst's Orders, has been held not to apply to commissions for examining witnesses abroad (*i*).

Abroad.

In ordinary cases.

Much discussion has taken place, with regard to the nature of the affidavit which is necessary to entitle the party to obtain an order for a commission. According to the books of practice, all that need be stated in the affidavit is, that some of the witnesses, whose evidence will be material, and whom it will be necessary to examine on behalf of the party making the application, reside at ——, (naming their place of residence,) and that the party cannot safely proceed to the hearing of the cause, without the testimony of those witnesses: and although in ordinary cases, where the application is made in a proper and early stage of the cause, the Court seldom or never denies making an order upon such an affidavit, yet it will exercise a discretion upon the subject. Therefore, where the object of the application, is to obtain evidence to assist the party applying to defend himself against an action at law, or where the effect of granting the commission, may be to interpose any material delay in the progress of the cause in this Court, an order for a commission to examine witnesses abroad, will not, if the application is opposed, be granted, unless the Court is fully satisfied that the justice of the case requires it. Thus where an application was made to examine witnesses in the East Indies, to shew that legacies, given in two codicils, were *cumulative*; the Court refused to make the order, because the party applying had not sworn that she believed they were so (*j*).

Where effect is to delay proceedings at law.

—or in this Court.

It does not appear to be necessary, that the affidavit should state that the matter, as to which the evidence is required, arose abroad: in *Akers* v. *Chancy* (*k*), it was at first thought that it ought, but it was afterwards held to be unnecessary, if it appears by the pleadings. Many doubts have also been entertained, as to the necessity of stating in the affidavit, the names of the witnesses, and the points as to which they are to be examined. By an Order of the Court, dated 26th of October, 1685, it is ordered, 'that where any person, plaintiff or defendant, shall ground any motion or petition on an affidavit of material wit-

Not necessary to state that matter arose abroad.

Whether the affidavit should state the names of witnesses, *query?*

(*i*) King of Spain v. Mendizabal 5 Sim. 596. Ante, p. 382.

(*j*) Coote v. Coote, 1 Bro. C. C. 448.

(*k*) 2 Bro. C. C. 273.

Abroad.

nesses to examine, whereby to gain longer time to examine, such affidavit shall contain not only the names of the chiefest of such witnesses, but the points to which such witnesses are desired to be examined, to the end, that the Court may see whether such points be material to be examined, and whether before or after hearing' (*l*). And in *Oldham* v. *Carleton* (*m*), it was contended for and admitted to be necessary, that the affidavit should state the names of the witnesses to be examined. In *Rougemont* v. *the Royal Exchange Assurance Company* (*n*), however, Lord Eldon appears to have made the order, although the names were not mentioned; and in *Shackell* v. *Macauley* (*o*), after the demurrer was overruled, Lord Eldon allowed commissions to be issued to *Sierra Leone* and the West Indies, though there was no affidavit stating the names of the witnesses, or the points to which their evidence applied, and though affidavits were filed by the defendant in equity, denying the facts stated by the Bill, as the foundation for the application to Equity.

It is to be remarked here, that, in *Mendizabal* v. *Machado* (*p*) Sir John Leach, V. C., although the case of *Rougemont* v. *the Royal Exchange Assurance Company* (*q*) was cited to him, held that the witnesses intended to be examined under the commission ought to be mentioned in the affidavit upon which the application for a commission is founded. The case, however, subsequently, came before Lord Eldon, upon appeal, when his Lordship expressed an opinion that the commission might issue; upon the authority of which opinion, although he had previously resigned the great seal, the order for a commission was drawn up (*r*). It is to be observed, that the ground upon which it is alleged to be necessary that the names of the witnesses should be inserted in the affidavit is, that the Court may be satisfied there is a reason for the application, in order that it may not be made use of for the mere purpose of delay (*s*); and there is no doubt that where this can be shewn by other means, as in the above case of *Mendizabal* v.

(*l*) Beames's Ord. 265.

(*m*) 4 Bro. C. C. 8; vide etiam Anon. 1 Vern. 334; Moody v. Steele, 2 Anst. 386; Royal Exchange Assurance Company v. ——, 2 Russ, 553 n.; Noble v. Garland, ib. 544 n.

(*n*) 7 Ves. 304.

(*o*) Cited 2 Russ. 550, n.; 1 Bligh's N. R. 96.

(*p*) 2 S. & S. 483.

(*q*) Ubi supra.

(*r*) Mendizabal v. Machado, 2 Russ. 540. 557.

(*s*) Carbonell v. Bessell, 5 Sim. 636.

Abroad.

Machado, the names of the witnesses need not be inserted. Where the application was made by the plaintiff at law, and was consequently in his own delay, the Court of Exchequer ordered a commission, though the names of none of the witnesses were stated (*t*).

—or the facts as to which the witnesses are to be examined. *Query?*

The question, whether it is necessary in the affidavit in support of a motion for a commission to examine witnesses abroad, to state the points as to which it is intended to examine them, is involved in the same uncertainty as the question regarding the insertion of their names. In *Oldham* v. *Carleton* (*u*), which has been before referred to, it was contended that the application ought to be made on special grounds, shewing in what points the evidence of the witness is material, and that, either in the pleadings or in the affidavit, the grounds ought to be stated; but the order was nevertheless made: and in *Rougemont* v. *the Royal Exchange Assurance Company* (*x*), a similar order was made by Lord Eldon, though the points to which the witnesses were to be examined were not stated. In *Mendizabal* v. *Machado* (*y*), however, the Vice-Chancellor, Sir John Leach, questioned the decision in the latter case, observing, that it was plain that it was not very much discussed, 'because it assumes that in *Oldham* v. *Carleton*, (which is there quoted without much examination,) the Court not only decided that it was not necessary to state the points to which it was proposed to examine the witnesses abroad, but also ruled that it was not necessary to name the witnesses; whereas it is expressly admitted, in *Oldham* v. *Carleton*, that though, according to the recollection of the Registrar, it is not necessary to state the points to which it is proposed to examine the witness, yet it is absolutely necessary to state the witnesses' names' (*z*). In addition to this, it is to be observed that, from the statement of the affidavit in *Rougemont* v. *the Royal Exchange Assurance Company*, which is to be found, copied from the Registrar's Book, in Mr. Russell's note to *Mendizabal* v. *Machado* (*a*), the materiality of the testimony of the witnesses

(*t*) Berthoud v. Cousins, 2 Fowl. Ex. Pr. 65.

(*u*) 4 Bro. C. C. 88.

(*x*) 7 Ves. 304; cited 2 Russ. 552.

(*y*) 2 S. & S. 483.

(*z*) Vide 2 Russ. 553. S. C.

(*a*) 2 Russ 552, n.

Abroad.

to be examined, to the matter in issue, was fully disclosed, as well as who the witnesses were, though their names were not mentioned. Many other cases may also be found which support the Vice-Chancellor's decision in *Mendizabal* v. *Machado*, upon this point (*b*); but it is to be remarked that, when the case afterwards came before the Lord Chancellor, upon appeal, his Lordship came to a different conclusion (*c*), and that, in a recent case (*d*), the present Vice-Chancellor, (Sir L. Shadwell,) granted a motion for a commission, although the affidavit did not state either the names of the witnesses, or the facts to which it was intended to examine them. It is, however, to be collected, from his Honor's judgment in that case, that, in order to dispense with the necessity of stating upon the affidavit the names of the witnesses, and the object as to which their testimony is required, the necessity for examining witnesses abroad must be evident, either from the affidavit or from the pleadings; and that the reason why Lord Eldon did not, in *Mendizabal* v. *Machado*, require those matters to be stated in the affidavit, was, that his Lordship had looked into the case as it appeared on the pleadings, in order to see whether there were facts as to which it was necessary the witnesses should be examined (*e*).

Affidavit must be made by the party or his Solicitor.

The affidavit in support of an application for a commission to examine witnesses abroad, should be made either by the party himself or his Solicitor (*f*), and therefore it was held, that the affidavit of an insurance broker, who had acted as agent for underwriters, who were sued on a policy, was insufficient (*g*).

Application for, not granted after great delay.

A plaintiff filing a Bill for a commission to examine witnesses abroad is bound to make his application for the commission as soon as he can after he is in a situation to do so;

(*b*) Anon. 1 Vern. 334; Shedden v. Baring, 3 Anst. 880; Noble v. Garland, 19 Ves. 372; Coop. 222, S. C.; vide etiam, 2 Russ. 544, n. S. C. where the facts are more fully detailed.

(*c*) 2 Russ. 540. Vide etiam Shackell v. Macauley, ib. 550 n.

(*d*) Carbonell v. Bessell, 5 Sim. 636.

(*e*) This appears also to have been the principle acted upon by Lord Hardwicke, in Chitty v. Selwyn, 2 Atk. 359; vide etiam Robinson v. Somes, 1 Y. & J. 578.

(*f*) Laragoity v. Attorney-General, 2 Pri. 172.

(*g*) Bonham v. Leigh. 5 Pri. 444.

Abroad.

at least, if he suffers any great delay to intervene, the Court will not make the order; thus where an original Bill was filed for an account, and for an injunction to restrain an action at law, and the injunction was granted for want of an answer, and extended to stay trial, but the defendant did not apply to dissolve it till ten years after the Bill was filed, when, upon his application, it was dissolved upon merits; whereupon the plaintiff filed a supplemental Bill, praying for a commission to examine witnesses abroad, (in defence of the action at law,) the Court would not grant him an order for a commission because of the delay which had taken place (*h*). And so where the plaintiffs in equity, who were defendants at law, after a verdict against them, obtained a rule for a new trial in April, and as their defence rested principally on transactions at Bilboa, they applied to the defendants to consent to a commission being issued for the examination of witnesses there, which being refused, they filed a Bill in Chancery for a commission and injunction, but did not serve process upon such Bill till the 10th of October, the Court refused to grant a commission in consequence of the delay which had taken place (*i*).

Commission not granted in aid of defence at law without staying trial.

It is to be remarked that, in the above case, the plaintiffs in equity merely asked for a commission, they did not apply for an injunction to stay the proceedings at law, and although that circumstance was insisted upon as a reason for granting the commission, as it could in no way delay the plaintiff at law, Lord Eldon asked, if there was any instance in which the Court had granted a commission without staying the trial? And whether if this Court will not stay the trial, it would make an order which the party expects may operate as an inducement to the Court of King's Bench to postpone the case (*k*)?

No rule in Chancery as to bringing money into Court.

It may be noticed in this place, that although the practice of the Court of Exchequer requires, in certain cases, that where a party who is a defendant at law, shall, upon obtain-

(*h*) Todd v. Aylwin, 1 Sim. 271.
(*i*) Hart v. Strong, 2 Russ. 560.
(*k*) Ibid. Vide etiam Shedden v. Baring, 3 Anst. 880, contra, Newland v. Horsman, 2 Ch. Ca. 74.

Abroad.

ing an order for a commission to examine witnesses abroad in aid of his defence to the action, bring the whole or part of the money, alleged to be due from him, into Court (*l*), no such practice exists in the Court of Chancery (*m*).

Time for making application where no equitable relief prayed.

Where the Bill prays no equitable relief, but merely seeks a discovery and a commission to examine witnesses abroad, in aid of an action at law, or of a defence to such a proceeding, the proper time for making the application is after the defendant's answer has come in (*n*), unless the defendant is in contempt for want of an answer, or has applied for time to put one in, in which case an order for a commission may be obtained immediately (*o*); the plaintiff, however, cannot have a commission till one of those events has taken place (*p*).

Practice under New Orders.

It is to be recollected, that, under the New Orders (*q*), the time which a defendant is allowed for putting in his answer has been very much extended, and that a defendant does not get into contempt or require an order for further time till after the lapse of eight weeks, if the cause be a town cause, and ten weeks, if it be a country cause, from the defendant's appearance (*r*), but as no case has occurred, in which the point was involved, since those Orders were pronounced, it is impossible to say whether the Court would require a plaintiff in equity to wait for a commission till the whole of the extended time for answering had elapsed: taking, however, the principles laid down in *Noble* v. *Garland* (*s*), as those upon which the Court proceeded under the old practice, in allowing a commission to be issued upon the defendant's being in contempt for want of an answer, or taking an order for time, it is presumed that the Court would now make an order for a commission upon the plaintiff's obtaining an injunction to stay proceedings at law, which, under the 10th of Lord Broug-

(*l*) Marryatt v. Nobre, 1 M'Lel. & Y. 101; Jackson v. Strong, 13 Pri. 309.

(*m*) Cock v. Donovan, 3 V. & B. 76. Vide post, 'Injunctions.'

(*n*) King v. Allen 4 Mad. 247.

(*o*) Noble v. Garland, 19 Ves. 372; Coop. 222, S. C.; 2 Russ. 544, S C.; Bowden v. Hodge, 2 Swanst. 258; Mendizabal v. Machado, ubi supra.

(*p*) Cheminant v. De la Cour, 1 Mad. 208.

(*q*) Ord. 1833.

(*r*) Ante, p. 273.

(*s*) 19 Ves. 377.

ham's Orders (*t*), he may still do if the defendant does not put in his answer within eight days after his appearance.

Abroad.

Where Bill prays equitable relief.

Although where the Bill merely prays a commission or a commission and injunction, without any other equitable relief, the application for a commission may be made at any time after the answer has been put in, or upon the defendant's being in contempt, or obtaining an order for further time; the rule is different when the Bill prays equitable relief. In such cases the application ought not to be made till after the cause is at issue.

This distinction was clearly recognized by Lord Eldon, in *Noble* v. *Garland* (*u*), who, in his judgment, appears to have doubted the propriety of his own decisions in two cases which were cited before him, in which he had granted a commission before answer, although the Bills prayed equitable relief.

Where Bill prays an account.

It may be observed, that where, by the course of the Court, an account must necessarily be directed at the hearing, a commission to examine witnesses beyond sea will not be granted before hearing, where the effect of it will be to delay the decree directing the account; the proper time to apply for such a commission is after the account is directed (*x*).

Form of the order.

The order for a commission to examine witnesses abroad generally states the affidavit upon which it is made, and then gives the party applying for it *liberty to sue out a commission to*

(*t*) Ord. 1833.

(*u*) Ubi supra; Foderingham v. Wilson, and Yates v. Barker, 19 Ves. 373 n. In Cheminant v. De la Cour, 1 Mad. 210, Sir Thomas Plumer, M. R., says, 'it is clear that in those cases the commission was moved for after the time for answering had elapsed, for injunctions had been obtained for want of answer.' From Lord Eldon's judgment in Noble v. Garland. The practice of the Court of Exchequer is the same as that of the Court of Chancery, viz., not to grant a commission to examine witnesses abroad in cases where the Bill prays equitable relief, before the cause is at issue. Some doubt, however, appears to exist, whether, where the Bill does not pray equitable relief, but is only auxiliary to an action at law, the Court of Exchequer, like the Court of Chancery, will grant a commission upon default of answer or upon taking an order for time; and it appears, that, formerly, the practice certainly was not to do so. Vide Lowther v. Worwood, 2 Fowl. Ex. Pr. 80; Cheminant v. De la Cour, 1 Mad. 208. But, in a recent case, the Court of Exchequer has granted a commission to examine abroad upon the defendant's time for answering having expired before the answer has come in. Hibberson v. Cambridge, 13 Pri. 796.

(*x*) Adam v. Bohun, Barnard. 270.

Abroad.

examine witnesses (or one or more commission or commissions,) at ——— and ——— and other places, returnable either without delay or on *a general return day* (y). *And that the defendant's Clerk in Court do, in four days after notice thereof, join and strike Commissioners' names in such commission, (or in each of the said commissions,) with the plaintiff's Clerk in Court; or, in default thereof, that the said commission, (or commissions respectively,) be directed to the plaintiff's own Commissioners.*

Where duplicate commissions are required.

Sometimes it directs, *that in case the defendant shall join in such commission or commissions, he is to be at liberty to take out a duplicate or duplicates of such commission or commissions if he think fit. And that, in such case, fourteen days' notice of the execution of such commission or commissions shall be deemed good notice to the defendants* (z).

Where witnesses are unacquainted with English.

Where the witnesses to be examined are foreigners and unacquainted with the English language, the following direction is usually added to the order:—'*And it is further ordered, that the Commissioners who shall execute the commission, or some person to be sworn by them truly to interpret the same to such of the said witnesses as can only speak in the* ——— LANGUAGE, *do interpret the interrogatories, to be exhibited at the execution of the said commission to such witnesses, out of the English language into the* ——— *language. And also the depositions of such witnesses as shall be examined thereon, out of the* ——— *language into the English language. And it is also ordered, that such interpreter be also sworn to keep the said depositions secret until publication shall* duly *pass in the cause* (a).

Service of order.

The order being drawn up, passed, and entered, must be served upon the adverse Clerk in Court, in the same manner as an order for a commission to examine witnesses in England, the original order being kept by the Clerk in Court suing out the commission (b). After this, the adverse party is to be called upon to join in commission, and to strike Commissioners' names, as in the case of ordinary commissions, and

Joinder in commission.

(y) Hind. 307. Without delay is the better and most usual form.

(z) Hand. 94; Bowden v. Hodge, 2 Swanst. 260.

(a) Vide Mr. Belt's note to Lord Belmore v. Anderson, 4 Bro. C. C. 90; and Bowden v. Hodge, 2 Swanst. 260.

(b) Hind. 307.

in default of the adverse party joining in commission, the commission is to be taken *exparte*. If the other party, after joining in commission, refuses to strike Commissioners' names, application must be made, by petition to the Master of the Rolls, in the manner before pointed out (*d*). It may be mentioned, in this place, that it is usual in commissions to examine witnesses abroad, to insert eight or more Commissioners' names; this is done to prevent all accidents which might prevent the execution of the commission, such as the absence or death of any of the Commissioners on either side.

Abroad.

Number of Commissioners.

A commission to examine witnesses abroad differs little in form from a commission to examine in England (*e*), unless it be a commission to examine foreigners in their own language, in which, instead of ordering that the oaths to be administered to the witnesses should be *upon the holy Evangelists*, directs that *the witnesses shall be examined on their respective corporal oaths, to be first taken before the Commissioners, or any two or more of them* SOLEMNLY (*f*). The commission, also, after the usual directions with regard to the oaths to be taken by the Commissioners and their Clerks, proceeds as follows,—'*And we do further give and grant unto you full power and authority, and we do by these presents command you, that you or any two or more of you do, after you have so entered upon the execution of this commission, swear one or more interpreter or interpreters, upon his or their corporal oath or oaths, well and faithfully to interpret the oath or oaths, and the interrogatories which shall be administered and exhibited by either party to any of such witnesses who do not understand the English language; and also to interpret their respective examinations and depositions taken to the said interrogatories* (*g*). And we further command and direct *that you or any two or more of you do certify to our Chancery in*

Form of commission.

(*d*) Ante, p. 496.

(*e*) A commission directed to the Judges of the Courts in India, under 13 Geo. 3, c. 63, s. 44, should recite the pleadings in the cause at length; Murray v. Lawford, 7 Sim. 139.

(*f*) Hind. 309; vide Ramkissenseat v. Barker, 1 Atk. 19.

(*g*) It seems that in the Court of Exchequer, a commission to take an answer is different in this respect from a commission to examine witnesses, and that where a commission to take the answer of a foreigner issues, a power to take it through an interpreter is virtually implied. Loughman v Novaes, 6 Pri. 108.

Abroad.

what manner the oath or oaths shall have been administered by you to the several witnesses respectively, who shall have been examined under the commission, and of what religion each and every of the said witnesses respectively is or are (h).

Return,

The return of a commission to examine abroad, is regulated by the order for the commission, and may be either *without delay* or on *a general return-day in term*, the former, however, is most usual and convenient.

—without delay

A return without delay *ex vi termini* imparts no definite period wherein the party is restricted to return the commission, and in commissions of this nature, no restriction as to time is imposed, as it is in the case of ordinary commissions (i). But this latitude of returning the commission, must not be converted to oppressive purposes, and if the commission be not executed and returned within a reasonable time, due allowance being made for the distance and other concurrent circumstances of time and place, the Court, upon application by motion will, if it appear that unnecessary or wilful delay has been occasioned, interfere; and probably, in a gross case, it will so far interfere as to make an order upon the party to expedite and return the commission by a limited time: and, in default, order publication to pass and let the cause proceed to a hearing (k).

On a day certain.

Where a commission is made returnable on a general return-day in term, the return is usually settled by the Clerks in Court or Solicitors, or by the Court if they differ. The return, in such cases, must be made to depend upon the distance of the place where the execution of the commission is to be had (l).

Execution of commission.

With respect to the execution of a commission to examine witnesses abroad, it differs so little from that of a commission to examine witnesses in England, that it is merely necessary, in this place, to refer the reader to what has been already written on the subject, and to point out a few particulars in which the different circumstances under which the commission is issued necessarily occasions a difference in practice.

(h) Ibid; for a return under this part of the commission, vide Omychund v. Barker, 1 Atk. 21.

(i) Wake v. Franklin, 1 S. & S. 97.

(k) Hind. 307.

(l) Ibid.

In the first place it is to be observed, that as the witnesses are resident out of the jurisdiction of the Court, no compulsory process can be resorted to for the purpose of compelling their attendance to be examined, (except in the case of commissions directed to the Judges of the Courts in the East Indies, under the 13 Geo. 3, c. 63, s. 44, before referred to, where the witnesses are amenable to the process of those Courts;) therefore no subpœna can be issued for that purpose. All, therefore, that can be done is to summon the witnesses by notice or letter.

Abroad. Attendance of witnesses.

Where the adverse party resides in England, it would, in most cases, be impossible to give him such notice of the time and place of executing a commission abroad as is essentially necessary to the regular execution of a commission to examine witnesses in England; such notice, therefore, is usually dispensed with, the Court, from the emergency of the occasion, substituting notice to the adverse party's Commissioners or to his agent, in lieu of notice to the party himself (m). For this purpose, the order for the commission, besides directing the adverse party's Clerk in Court, within a limited time, to join and strike Commissioner's names, *directs him to name an agent in the place where the commission is to be executed, to whom notice of the execution of the commission is to be given*, and orders, that *service of the notice upon such agent shall be good service, and that in default of joining in commission or naming an agent, the commission shall issue exparte.*

Notice of execution; —to agent of party; —directed by order.

Sometimes the order does not direct the adverse party to name an agent; in such case, it seems necessary that the party applying for the commission should make a subsequent application, by motion or petition at the Rolls, for an order as of course, that he may be at liberty to serve any one or two of the adverse party's Commissioners with notice of the execution of the commission.

Service upon Commissioners.

Where a commission had been issued to examine witnesses abroad, the plaintiff, after the Commissioners' names had been struck, moved that he might be at liberty to serve any one

(m) Hind. 312.

Abroad.

or two of the defendant's Commissioners with notice of the execution of it, when it was alleged on the other side that the rule of the Court was, that the plaintiff should serve such two of the defendant's Commissioners as the defendant should choose; but Lord Hardwicke ordered, that the plaintiff should be at liberty to serve any two of the defendant's Commissioners, observing, that the rule never could be as laid down, because it would be attended with this inconvenience, that, if the two particular Commissioners chosen by the defendant should happen to be absent from the place appointed for the execution of the commission, or either of them should be dead, it could not be executed (n).

The label to the commission, in general, points out the person or persons to whom the notice of the commission is to be given (o).

Method of examination.

The examination and cross-examination of the witnesses under a commission to examine abroad, are subject to the same rules and regulations as examinations under commissions in England (p) or before the Examiner (q). The return must also be made in the same manner. Where any oaths than the ordinary Christian oaths have been administered to the witnesses, the return must state in what manner the oaths have been administered, and of what religion such witnesses are (r).

Where witness does not speak English.

It may be noticed in this place, that, under a commission to examine witnesses who cannot speak English, the usual and proper course is to take down the depositions from the interpreter in English (s). This, however, does not appear to be absolutely necessary, since, in some cases, examinations taken down in a foreign language have been recognized by the Court. If the depositions are taken down in the language of the witness, they must afterwards be translated, out of that language into English, by a person appointed by the Court for such purpose, who must be sworn to the truth of his translation (t), and must attend at the office for the purpose of making

(n) Anon 3 Atk., 633.
(o) Hind. 310.
(p) Ante, p. 508.
(q) Ante, p. 482.
(r) Omychund v. Barker, 1 Atk. 21, and ante, p. 535.
(s) Lord Belmore v. Anderson, 4 Bro. C. C. 90.
(t) 1 Newl. Ch. Pr. 279.

it, for the Court will not make an order for the record of the depositions to be delivered out, in order that they may be translated (*u*).

Abroad.

Translation of depositions.

The translation, after the truth has been sworn to, is annexed to the record, and an office copy made of it, which will be permitted to be read at the hearing; an order for that purpose having been previously obtained, which is usually applied for at the same time that the application is made for the appointment of a person to translate the depositions (*x*).

How returned.

Where a commission has been executed abroad, the person who takes it out and returns it ought to make affidavit that he received it from the Commissioners (*y*); in an old case, however, leave was given to send and return a commission by the post (*z*); and in another, where the messenger who brought the commission from abroad, being detained in quarantine after his arrival in this country, sent it up by the coach to the Solicitor in London, the seal being still unbroken, it was received (*a*).

Where lost at sea.

Where a commission for the examination of witnesses in Lisbon was executed, and forwarded with the depositions to England, but the ship in which they were sent was lost on the passage, the Court ordered the Commissioners, or any two of them, to transmit the *drafts* of the depositions, and to certify the circumstances of the return of the commission, but would not make any order for reading the drafts of the depositions, &c., at the hearing of the cause, until after the Commissioners had made their return and certificate (*b*).

Abatement of suit.

It seems that a commission to examine witnesses abroad will not be affected by an abatement of the suit; and that depositions taken under it, (provided neither Commissioners nor the witnesses have received notice of the abatement,) will be good evidence (*c*).

(*u*) Fauquier v. Tynte, 7 Ves. 292.

(*x*) 1 Newl. Ch. Pr. 279.

(*y*) Bourdillon v. Alleyne, 4 Bro. C. C. 100.

(*z*) Newland v. Horsman, 2 Ch. Ca. 74.

(*a*) Bourdieu v. Trial, 2 Fowl. Ex. Pr. 80.

(*b*) Burn v. Burn, 2 Cox, 426. Vide etiam Jones v. Donithorne, 1 Dick. 352; ante, p. 517.

(*c*) Thompson's case, 3 P. Wms. 195; Winter v. Dancie, Toth. 99.

Abroad.

The rule as to the costs of a commission to examine witnesses abroad is, that they are to be borne by the party obtaining it; but that if the opposite party examines under it in chief, he must bear his proportionate share(*d*). The costs of a Solicitor attending the execution of a commission abroad will not be allowed in taxation(*e*).

SECT. V.

Of the Examination of Witnesses— de bene esse.

Origin of the practice.

THE Court of Chancery, in its primæval institution, participated much in the practice adopted by the Courts of Civil Law. The civilians had a manner of examining witnesses *in perpetuam rei memoriam*, which was twofold, either the *common examination*, or in *meliori formâ*. The *common examination* was where the witnesses were very old and infirm, sick, in danger of death, or were going into distant countries. In this case, it was usual to file a libel, and, without staying for the *litis contestatio*, the *actor* examined his witnesses, immediately giving notice, if it were possible, to the other side, of the time and place of the examination, that he might come and cross-examine such witnesses if he thought fit; and these depositions stood good in case the witness died or went abroad; but the *actor* was obliged *edere actionem* within a year, otherwise the depositions went for nothing. If the witnesses lived or did not go abroad into distant countries, then they were to be examined *post litem contestatam*(*a*).

The examination *in perpetuam rei memoriam in meliori formâ* was *ad transmutendum instrumenta;* and in that case there must have been *a litis contestatio* before the examination, because there was no need of so much celerity in proving the instru-

(*d*) Jackson v. Strong, 13 Pri. 389.

(*e*) Hamond v. Wordsworth, 1 Dick. 351.

(*a*) Hind. 365.

In what cases.

ments as there was, where the witnesses were likely to die, or were going into remote parts; in these cases the *actor* was not bound to proceed in any action upon those instruments within the year. But in both cases it seems that *publicatio testium* took place, when the judgment was begun before the ordinary Judge, or, which is the same thing, when there was a *litis contestatio* (*b*).

The examination *in perpetuam rei memoriam*—in *meliori formâ*, has been adopted by the Court of Chancery, and the practice with regard to it will be considered when we treat of suits instituted for the purpose of perpetuating the testimony of witnesses. The common examination *in perpetuam rei memoriam* has likewise been adopted by Courts of Equity in their practice of examining witnesses *de bene esse* (*c*), which forms the subject of the present section.

In what cases resorted to.

The examination of a witness *de bene esse* takes place where there is danger of losing the testimony of an important witness from death, by reason of age, (as where the witness is seventy years old and upwards (*d*)); or dangerous illness (*e*); or where he is the only witness to an important fact (*f*): in such cases, the Court, to prevent the party from being deprived of the benefit of his evidence, will permit his depositions to be taken before the cause is at issue, in order that, if the witness die, or be not forthcoming to be examined after issue joined, the depositions so taken may be used at the hearing (*g*).

Incidental to every suit;

—to Bills to perpetuate testimony.

The examination of a witness *de bene esse* may be incidental to every suit, whereas the examination for the purpose of perpetuating the testimony is the fruit of a suit instituted for that particular purpose; it may even be incidental to a suit to perpetuate testimony, where there is danger that the evidence

(*b*) Hind. 365.
(*c*) Ibid 368.
(*d*) Rowe v. ——, 13 Ves. 261
(*e*) Bellamy v. Jones, 8 Ves. 31.
(*f*) Shirley v. Earl Ferrers, 3 P. Wms. 77; Pearson v. Ward, 2 Dick. 648; Brydges v. Hatch, 1 Cox, 423. In Earl Cholmondeley v. the Earl of Orford, 4 Bro. C. C. 157, two witnesses were ordered to be examined *de bene esse*, being the only persons who knew material facts.
(*g*) Hind. 368.

In what cases.

of the witnesses whose testimony is intended to be perpetuated being lost before the suit for perpetuating is ripe for a regular examination (*h*).

Cannot be after publication,

It is to be observed, that, in general, the Court will not allow the examination of a witness *de bene esse*, with a view to ulterior proceedings, such as the trial of an issue, after the depositions of other witnesses in the cause have been published: and, therefore, where, upon a hearing, an issue had been directed, and an order made, that the depositions of the plaintiff's witnesses might be read at the trial, in case such witnesses, or either of them, should be dead, &c., and an application was afterwards made that the trial should be postponed, and that the plaintiff should be at liberty to examine another witness *de bene esse;* Lord Eldon, after consulting with the Master of the Rolls, (Sir William Grant,) said, that the motion was one which could not be made with effect, without laying before the Court very strong circumstances to induce it to permit the examination; and although he would not say that it could not be granted in any case, he refused it in the one before him (*i*).

—unless after trial of issue.

It seems, however, that where a witness who has not been before examined in this Court has been produced at a trial at law, and another trial of the same matter is to be had, the Court will entertain a motion for the examination of such witness *de bene esse*, with a view to such second trial (*k*). And so after the trial of an issue in the cause, an application, on the part of the plaintiff, for liberty to examine a witness, who was above seventy years old, *de bene esse*, for the purpose of securing his testimony in case of his death, upon the ground that it was intended to move for a new trial, was granted (*l*).

Where evidence of witness is required at law.

Sometimes the testimony of the witness is required to be used either in support of, or in defence to, an action at law; in such case, a Bill must first be filed in this Court, with the proper affidavit annexed to it, praying specifically that the witness may be examined *de bene esse* (*m*).

(*h*) Frere v. Green, 19 Ves. 319.

(*i*) Palmer v. Lord Aylesbury, 15 Ves. 299.

(*k*) Anon. cited by Lord Eldon, ibid.

(*l*) Anon. 6 Ves. 573.

(*m*) Phillips v. Carew, 1 P. Wms. 117; Andrews v. Palmer, 1 V. & B. 21, 23; 1 Newl. Ch. Pr. 287. By the Statute 1 W. 4, c. 22, s. 4,

It is to be observed, that an order of this nature, in aid of a proceeding at law, cannot be obtained upon a Bill filed for any other purpose: and that where a Bill was filed for a commission to examine witnesses abroad in aid of a trial at law, and a commission had been sent out accordingly, but, before it reached its destination, one of the witnesses returned to England, whereupon an application was made for leave to examine him *de bene esse*, upon the ground that he was about to leave the country again before the trial could be had; the Vice-Chancellor, Sir John Leach, refused the motion, observing, that this was a different relief, and that the Bill must be amended (*n*).

In what cases.

The cases in which the Court will make an order for the examination of witnesses *de bene esse* are not confined to those of age or sickness, or in which the witness is the only person who can speak to the fact intended to be proved. The Court will give permission for such an examination of witnesses in other cases which come within the same principle;—indeed it will do so wherever the justice of the case appears to require it. Thus where an application was made to examine the surviving witness to a will *de bene esse*, on the ground that the parties concerned all lived in America, and that the surviving witness was greatly afflicted with the gravel, the order was made, although the witness was not stated to be more than 'upwards of sixty years old' (*o*). So also where the age of the witness was not stated, but the affidavit, upon which the application was made, alleged only that the witness was subject to violent attacks of the gout, and from these attacks was under the apprehension of dying, and that he was a material witness, his testimony being required to prove the draft of a bond which he had prepared, but which was lost, the Court of Exchequer made an order for his examination *de bene esse* (*p*). In like manner, where a witness is about to go abroad, the Court will make an order for his examination *de bene esse;* and for this purpose, Scotland, being out of the jurisdiction of the Court, the circum-

Not confined to cases where the witness is old or sick, or the only witness.

Allowed where no age is stated, nor immediate death apprehended.

Where witness is about to go abroad.

the necessity for resorting to equity for this species of assistance has been done away with, although the jurisdiction has not been taken away.

(*n*) Atkins v. Palmer, 5 Mad. 19.

(*o*) Fitzhugh v. Lee, 1 Amb. 65.

(*p*) Jepson v. Greenaway, 2 Fowl. Ex. Pr. 103.

In what cases. stance that a witness is going thither is considered a sufficient ground (*q*).

Secus **where the party may detain him.**

The Court, however, will not permit the examination of witnesses *de bene esse*, on the ground of their being about to go abroad, where it is in the power of the party applying, to detain them, till they have been examined in the ordinary course. Upon this ground the Court of Exchequer refused to make an order, on the application of the East India Company, for the examination of witnesses *de bene esse*, who were going to the East Indies, because they were the Company's servants, and they might have kept them at home (*r*).

Where death of one witness would destroy a whole chain of evidence.

It seems, also, that, in a question of pedigree, where the case depends upon a chain of distinct circumstances in the knowledge of different individuals, the death of one of whom would destroy the whole chain, the Court will permit the examination of such individuals *de bene esse*, although none of them come within the description of witnesses whose testimony is in danger of being lost either from age or serious illness (*s*).

Refused where witness is not the only witness.

The rule, however, that the examination of a witness *de bene esse* will be permitted where the individual proposed to be examined is the only witness, will not be extended to cases where there is more than one witness to the same fact, unless upon the ground of the age or infirmity of the witness; therefore, where an application was made for leave to examine *de bene esse* one of two surviving witnesses to a will, who was neither of the age of seventy nor in a state of dangerous illness, on the ground that he was a prisoner in the Castle of York, charged with a capital felony, no order was made (*t*).

Examination of parties to the record;

The same rules which have been before laid down with regard to the examination of parties to the record in the ordinary course, are applicable to their examination *de bene esse;* thus an order may be obtained to examine a defendant as a witness *de bene esse*, 'without prejudice,' under the same circumstances as

(*q*) Botts v. Verelst, 2 Dick. 454.

(*r*) The East India Company v. Naish, Bunb. 320.

(*s*) Shelley v. ——, 13 Ves. 56. Vide etiam Shirley v. Earl Ferrers, 3 P. Wms 77.

(*t*) Anon. 19 Ves. 321.

those under which such an order could be obtained for his examination in chief; but an order to examine a plaintiff would be irregular (*u*).

Of parties to the record.

It may be mentioned here, that if a person who has been examined as a witness *de bene esse*, not being at the time interested, afterwards becomes interested in the subject-matter of the suit, his depositions *de bene esse* may be read at the hearing (*x*).

—becoming so after examination.

An order for leave to examine a witness *de bene esse*, upon the ground of the witness being seventy years of age, or dangerously ill, or of his being the only witness to a material fact, may be obtained either by motion in Court, without notice, or upon petition at the Rolls (*y*). In either case the application may be made before answer (*z*), or even before appearance, provided the defendant has been served with a *subpœna* (*a*). From an observation which appears to have been made by Lord Eldon in *Frere* v. *Green* (*b*), it may be inferred that an order of this nature cannot be obtained before appearance, unless the defendant is in contempt; but the practice is not so, and an order to examine a witness *de bene esse*, upon either of the grounds above stated, will be granted, upon the proper affidavit, immediately after the filing of the Bill, without waiting either for the defendant's appearance, or for his being in contempt for non-appearance (*c*).

Order for, in what cases granted without notice;

—before answer or appearance;

—immediately upon filing the Bill.

There seems, however, no doubt that the contempt of a defendant in not appearing would, at any time, be a reason for giving permission to a plaintiff to examine his witnesses *de bene esse*, where a proper ground is laid for it, even where the case does not come within any of the three instances above mentioned (*d*); and that a reference of the plaintiff's Bill for impertinence is no reason for refusing the order.

In all cases where party is in contempt;

—notwithstanding reference for impertinence.

(*u*) Mayor, &c., of Colchester, v. ——, 1 P. Wms. 595.

(*x*) Brown v. Greenly, 2 Dick. 504.

(*y*) Bellamy v. Jones, 8 Ves. 31; Tomkins v. Harrison, Mad. & Geld. 315.

(*z*) Bown v. Child, 3 Sim. 457.

(*a*) Wilson v. Wilson, cited 1 Newl. Ch. Pr. 287.

(*b*) 19 Ves. 319.

(*c*) Dew v. Clarke, 1 S. & S. 108.

(*d*) Coveny v. Athill, 1 Dick. 355; Pritchard v. Ge[illegible], 5 Mad. 364.

Application for leave.

Where applied for by defendant.

A defendant, although he may, equally with the plaintiff, examine a witness *de bene esse*(*e*), cannot obtain an order for that purpose before he has put in his answer(*f*); but where a plaintiff has obtained an order for a commission to examine witneses *de bene esse*, the defendant, if he has any witnesses to examine *de bene esse*, may, to save the expense of another commission, obtain an order for leave to examine his own witnesses, (*nominatim*,) under the plaintiff's commission. Without such an order, he cannot examine his witnesses under that commission, but must obtain one for himself(*g*).

Notice required in special cases.

Where the application is not made on the ground of the age or dangerous illness of the witness, or because he is the only witness, the Court will not make an order for his examination *de bene esse* as of course(*h*). Therefore, if a party wishes to examine a witness *de bene esse*, upon a ground which cannot be arranged under either of those classes, he must apply, by motion in Court, of which notice must be given to the other side. Therefore, where an application was made, *exparte*, for leave to examine a witness *de bene esse*, upon an affidavit stating that she, the witness, was far advanced in a state of pregnancy, and had been ill of a fever, from which she had not yet recovered, and was attended by two physicians, and that she was in a very weak low state, Lord Eldon refused to make the order, and gave the plaintiff leave, either to amend the affidavit by stating that the witness was dangerously ill, or to give notice of the motion.

Secus where defendant is in contempt for non-appearance; —although he be an infant.

It seems, however, that, where a defendant is in contempt for non-appearance, such an order may be obtained without notice, and this even where the defendants are infants. Thus, in *Frere* v. *Green* (*i*), where the defendants were infants and in contempt, by the messenger's return that they had absconded and were not to be found, Lord Eldon, upon the usual affidavit of the materiality of the evidence of the witnesses, &c., and the plaintiff's undertaking to proceed with all due diligence, and

(*e*) Williams v. Williams, 1 Dick. 92; Sheward v. Sheward, 2 V. & B. 116.

(*f*) Williams v. Williams, ubi supra.

(*g*) Hind. 312.

(*h*) Bellamy v. Jones, 8 Ves. 31.

(*i*) 19 Ves. 319.

with as much expedition as the course and practice of the Court and the contempt of the defendants would admit, to bring the cause to an issue, and examine their witnesses in chief, made an order that the plaintiffs should be at liberty to examine them *de bene esse;* but he provided, by the order, that, before publication of the depositions of such witnesses should be allowed to pass, proper evidence should be produced to satisfy the Court that the plaintiffs had complied with the above undertaking (*ii*).

Application for leave.

It is to be observed, that when it is said that, in the instances above mentioned, an order to examine a witness *de bene esse* may be obtained upon motion or petition without notice, this is only applicable to the order,—in all cases the usual notice of the examination of the witness, or the execution of the commission for that purpose, is indispensable, that the other side may have the power of cross-examination (*k*).

Affidavit in support of application.

The application for leave to examine a witness *de bene esse*, must, in every instance, whether made by petition at the Rolls or by motion to the Court, with notice or without, be supported by an affidavit of the facts which form the ground of the application, such as the age of the witness, &c., and that he is a material witness for the party making the application.

Where witness is the only person who can prove the fact.

Where an application is made for an order to examine a witness on the ground that he is the only person who knows the fact, the affidavit should state the particular points to which his evidence is meant to apply (*l*); and it should be shewn, not only that the witness is a person who knows the fact, but that he is the *only person* who knows it, and the affidavit should also shew the ground which the person who makes it has for believing that the witness is the only person (*m*). Therefore where an order was applied for, to examine several witnesses *de bene esse*, one upon the usual affidavit that he was above se-

(*ii*) Ibid. Vide etiam Shelley v. ——. 13 Ves. 56.

(*k*) Loveden v. Lord Milford, 4 Bro. C. C. 540.

(*l*) Pearson v. Ward, 1 Cox. 177; 2 Dick. 648. S. C.

(*m*) Rowe v. ——, 13 Ves. 261. Vide etiam Parson v. Ward, cited 1 Harr. Ed. Newl. 278.

Affidavit in support of application.

venty years of age, and the other upon the affidavit of the agent, who stated that he was informed by the witness that he could prove the particular fact, and that he, (*i. e.* the agent,) believed that he was the only person who could do so, Lord Eldon, although he granted the application as to the witness who was above seventy, refused to make it as to the other (*n*).

Commission, in what cases necessary.

Where the witnesses, proposed to be examined *de bene esse*, reside more than twenty miles from London, the petition or motion upon which the application is made should pray a commission, in which case the order will direct the issuing of a commission, if necessary, with the usual directions (*o*).

Order for.

The order to examine witnesses *de bene esse*, gives liberty to examine such and such witnesses *nominatim*, and will only authorize the examination of the persons named therein.

Service of,

—where before appearance.

Where it is obtained, without notice after appearance, it must be served upon the Clerk in Court on the other side. Where it has been obtained before appearance, so that there is no adverse Clerk in Court upon whom it can be served, it must, if a commission is sued out under it, be served upon the adverse party himself, a certain number of days before the examination; for which purpose the order usually directs that 'notice of the order be given to the defendants, respectively, or a copy thereof left at their dwelling-houses or usual places of abode, with their servants, agents, or other persons residing there, ten days at least before the execution of the said commission' (*p*). This is done in order to afford the adverse party an opportunity for cross-examination of the witnesses. Where the witnesses are to be examined in town, the course is to give three days' notice to the other side of the intention to examine (*q*).

Form of commission.

Where the order embraces the issuing of a commission, it must, after service, be left with the Clerk in Court, who will make out the commission, which is nearly the same as the or-

(*n*) Sed vide the note to Hankin v. Middleditch in Mr. Belt's ed. of Brown, vol. 2, p. 340, where the affidavit upon which Lord Thurlow made the order, does not appear to have been more full than that in Bellamy v. Jones.

(*o*) Hind. 315.

(*p*) 1 Smith's Ch. Pr. 508.

(*q*) Tomkins v. Harrison, Mad. & Geld. 315.

dinary commission, the principal variation being that it specifies the particular witnesses to be examined, and does not authorize the examination of witnesses generally (*r*).

Form of commission.

The examination is taken in the same manner as the examination of a witness in chief, either at the Examiner's Office, upon producing the order to the Examiner, or by commission, which, when it is required, is generally made part of the motion and embraced in the order. In either case, all the formalities which are required in the examination of witnesses in chief, must be observed (*s*), at least so far as the circumstances of the case will admit of their being so.

Method of examination.

As the examination of witnesses *de bene esse*, is only a provisional measure, to guard against the loss of important evidence before the cause is in a state in which a regular examination can take place, it is the duty of the party examining to take the earliest opportunity to examine in the ordinary course, and if he is guilty of any *laches* in so doing, the benefit of the examination *de bene esse*, will be forfeited. In the *Duke of Hamilton* v. *Meynal* (*t*), however, Lord Hardwicke made an order for the publication of depositions taken *de bene esse*, although the original Bill was filed, and the examination taken above thirty years before the cause was brought to an issue; but, it seems, from the note of the Reporter, that this was done under particular circumstances, and that the delay was accounted for in the suggestion of the order (*u*).

After examination *de bene esse*, due diligence must be used to examine in chief.

We have seen before, that in the instance of an application to examine witnesses *de bene esse*, to prove a case against infant defendants who were in contempt for non-appearance (*x*), Lord Eldon made the order upon the plaintiff's expressly undertaking to proceed with all due diligence to bring the cause to issue and to examine the witnesses in chief.

If a plaintiff after the examination of witnesses *de bene esse*, replies to the defendant's answer, but does not serve a subpœna to rejoin, the proper course for the defendant to pursue,

Course of proceeding where plaintiff does not serve a subpœna to rejoin.

(*r*) Hind. 313.
(*s*) Ibid.
(*t*) 2 Dick. 788.
(*u*) Ibid. Vide etiam Anon. 2 Ves. 496.
(*x*) Ante, p. 547; Frere v. Green, 19 Ves. 319.

Publication of depositions.

if he wishes to compel a re-examination of the witnesses in chief, and is not in a situation to dismiss the Bill under the 17th order, is to appear and file a rejoinder *gratis* (*y*).

Publication of depositions.

Depositions, taken *de bene esse*, cannot be published without an order. The ordinary course of the Court is not to allow of their publication unless the witness dies before issue is joined in the cause, so that there has been no opportunity to examine him in the ordinary course; or unless he is at a great distance, so that it is impossible to have him examined again. In such cases, an order for the publication may be obtained on motion of course, supported by a proper affidavit. (*z*) These, however, although the usual, are not the only cases, in which the Court will order depositions taken *de bene esse* to be published. Sometimes there are cases in which particular questions arise on particular circumstances, in which it is in the discretion of the Court to determine whether publication shall pass or not; and whenever it can be established to the satisfaction of the Court, that there is a moral impossibility against the examination of witnesses in chief it will allow it. Therefore, in *Cason v. Wordsworth* (*a*), which has been before referred to (*b*), where a commission was sent to Sweden, to examine witnesses there, which the Government of Sweden refused to permit, the Court allowed the depositions of those witnesses who had been examined *de bene esse*, to be read at the hearing, because it was morally impossible to have them examined in chief. So also the Court has permitted depositions taken *de bene esse* to be read, although there has been no strict proof of the death of the witnesses, because the length of time which has elapsed since the depositions were taken, has afforded a just ground for presuming them to be dead (*c*).

Wherever there is a moral impossibility that examination in chief can take place.

Where witness cannot attend trial at law.

Sometimes, where the evidence is required upon a trial at law, the Court will order depositions taken *de bene esse* to be published, on the ground that the witness, though alive, will be un-

(*y*) Ante, p. 394.

(*z*) Hind. 387.

(*a*) 2 Ves. 325, 336; Amb. 108. S. C.

(*b*) Ante, p. 521.

(*c*) Anon. 2 Ves. 496; Marsnen v. Bound, 1 Vern. 331.

able from age or sickness or other infirmity to attend at the trial (*d*). In such cases, however, the more usual course is, (especially where there is any doubt whether the grounds upon which application is to be made are such as will be sufficient in a Court of Law, to authorize the admission of the evidence, and there will therefore be danger, that the evidence, if published before that point is decided, will be lost, to make an order that the officer, in whose possession the original deposition is, shall attend with it at trial, in order that, if it should be proved to the satisfaction of the Court of Law, that the witness is unable to attend, then the depositons should be rendered and read (*e*), it being the province of the judge who tries the cause at law and not of this Court, to decide on the admissibility of the evidence upon the facts as they appear before him (*f*). Upon this ground, the Court has frequently refused to make an order that the depositions, taken *de bene esse*, of a witness who was alive, though sworn by affidavit to be unable to attend at the trial of an issue at law, should be read at the trial (*h*).

Publication of depositions.

It is to be observed, that depositions of a witness examined *de bene esse*, can never be published, unless for the purpose of supplying the want of an examination in chief. Applications, to this effect, have been made where many circumstances have concurred to induce a belief, that the examination *de bene esse* and the examination in chief were contradictory, but, after solemn argument, have been refused (*i*). Even publication, for the private inspection of the Lord Chancellor only, in the nature of an examination *ad informandam conscientiam judicis*, where it was supposed the examination *de bene esse* was more full than the examination in chief, has been refused, although precedents in former times authorized such a practice (*i*).

Publication never permitted unless to supply the place of an examination in chief.

In *Pegge* v. *Burnell* (*k*), an application was made to the

(*d*) Bradley v. Crackenthorpe, 1 Dick. 183.

(*e*) Andrews v. Palmer, 1 V. & B. 21. Vide etiam Corbett v. Corbett, ib. 335; Palmer v. Lord Aylesbury, 15 Ves. 176.

(*f*) Jones v. Jones, 1 Cox. 184.

(*g*) Ibid.

(*h*) Hind. 390.

(*i*) Cann v. Cann, 1 P. Wms. 567.

(*k*) Cited Hind. 291; Pasch. 1781.

Publication of depositions.

Court to publish a deposition *de bene esse*, in order that it might be read at law, to confront the witness and invalidate his testimony *viva voce*, upon a new trial, on the ground that on his examination, at the first trial, his evidence differed materially from what he had before uniformly declared the fact to be; and as the case made in support of the motion was a very strong one, and abundantly sufficient to justify a departure from the strict practice, if it were possible in any case to dispense with it, the Lord Chancellor, (Lord Thurlow,) at first made the order, but upon further consideration, and before the order was delivered out, he altered his opinion and refused the order.

Order for publication, how obtained.

To obtain an order for the publication of a deposition, taken *de bene esse*, of a witness dying before he could be examined in chief, a certificate of the burial of the witness from the General Registry Office in Somerset Place, under the seal of the Registrar; or an extract from the register of burials of the parish where the deceased was buried, verified by affidavit, of the person who made the search, should be procured, together with an affidavit to identify the witness with the person named in the certificate or register; and an application should then be made to the Court, either by motion of course or by petition at the Rolls, supported by such affidavit and certificate or copy of register, for an order to publish the depositions (*l*).

Were the application is made upon the ground that a witness is gone to parts beyond sea or upon any other grounds, it must be supported by affidavit of the facts relied upon as the foundation of the application.

When to be obtained.

The proper stage of the suit wherein this application should be made, seems to be after publication has passed in the cause (*m*), unless it is in a suit the sole object of which is the examination of a witness *de bene esse*, for the purpose of using his depositions on a trial at law, in which case the application should be made before the trial of the action. Where the application is made by motion in Court, notice in writing to the

(*l*) Hind. 388. (*m*) Ibid.

adverse Clerk in Court is also necessary (*p*); and an affidavit of service of the notice of motion should in that case be made, in order that, if the other side do not attend, the order may notwithstanding be made.

Publication of depositions.

When the order is obtained upon petition, a copy of the order, when passed and entered, must be served upon the adverse Clerk in Court (*q*).

Service of.

The order to publish the depositions must, after service, (if the depositions were taken by commission,) be left with the Clerk in Court in whose hands the depositions are lodged, or, (if the depositions were taken by the Examiner,) with the Examiner; and, upon the order being so left, the depositions will be re-opened, and copies delivered out to the parties applying for them (*r*).

Publication, how effected.

If any irregularity be discovered, or the adverse party be advised of any ground of objection to the reading of the depositions, he should give notice in writing to the adverse Clerk in Court, and move to discharge the order immediately upon the service of it, or on the earliest opportunity; for it seems that, although depositions taken *de bene esse* are irregular, yet it is too late to object to them, on the ground of irregularity, at the hearing of the cause (*s*); and on this account, when the time between the publication and the hearing of the cause is short, the Court will extend it, for the purpose of allowing the party an opportunity of examining, whether the depositions are regularly taken or not (*t*). And so where depositions taken *de bene esse* are read at the hearing of the cause, it is a matter of course, if an issue is directed, to order them to be read at the trial of the issue, notwithstanding an irregularity in the examination (*u*).

Irregularity must be taken advantage of before hearing.

With respect to the costs of examinations *de bene esse*, no specific rule appears to have been laid down which makes

Costs.

(*p*) Hind. 388.
(*q*) Ibid. 389.
(*r*) Ibid.
(*s*) Dean and Chapter of Ely v. Warren, 2 Atk. 190.
(*t*) Gordon v. Gordon, 1 Swanst. 171.
(*u*) Ibid. 166.

Costs.

any distinction between them and the costs of examinations under ordinary circumstances, except, indeed, in the case of Bills filed for the expressed purpose of having witnesses examined *de bene esse*, in order to render their evidence available on a trial at law. In such cases, it is presumed, the costs must be regulated by the rule of the Court with regard to Bills of a similar description, viz., Bills to examine witnesses *in perpetuam rei memoriam* in which case a defendant is entitled to apply for his costs immediately after the examination of the witnesses has been perfected, upon the simple allegation that he did not examine any witnesses himself (*x*). It may be mentioned, that in *Dew* v. *Clarke* (*y*), where the plaintiff had filed a Bill for the purpose of obtaining the examination of witnesses *de bene esse* in aid of a proceeding at law, and obtained an order *exparte* for the examination of such witnesses, but afterwards the Bill was demurred to, and the demurrer allowed; the Court, besides the usual costs of the demurrer, allowed the defendant his costs of the examination, but not those occasioned by his cross-examination of the witnesses.

Sect. VI.

Of Demurrers to Interrogatories.

Nature of demurrers.

Every witness is, as we have seen, bound by the form of the oath administered to him previously to his examination, 'to make true answer to all such questions as shall be asked of him upon the interrogatories' filed for his examination. It is obvious, that this obligation, if strictly insisted upon might, in many cases, be the means of inflicting great injury either upon the witness himself, or upon others, by compelling him to disclose matters which it is against the rules and principles by which the Courts are usually governed that he should discover. In Courts of Law, a witness has it in his power imme-

(*x*) Foulds v. Midgley, 1 V. & B.

(*y*) 1 S. & S. 108.

Nature of.

diately to take the opinion of the presiding judge as to his right to withhold an answer to any question which may be put to him; but in Courts of Equity a witness has no such power; neither the Examiner nor the Commissioners before whom a witness is examined being authorized to pronounce a judgment as to the propriety of the question put to a witness; still the witness is not left without remedy, and a method is provided by the practice of those Courts by which he may submit his objection to answer the questions proposed to him to the decision of the judge. This he does by means of a process called '*a demurrer to the interrogatories*.'

The word 'demurrer,' however, is not, in this instance, used in a very appropriate sense, since, in a case of this description, it signifies merely the witness's tender of reasons why he should not answer the questions (*a*), and is not, like a demurrer in pleading, confined to the facts appearing upon the record, but states the facts upon which the witness relies as the ground of his objection.

In what cases proper.

The grounds upon which a witness may protect himself from answering to interrogatories, are nearly the same as some of those which a defendant has a right to insist upon as a reason for not giving the discovery required by a Bill (*b*). These are, principally, 1. That they may subject the witness to pains and penalties, or to a forfeiture, or something in the nature of a forfeiture; 2. That the disclosure required may subject the witness to a decree against himself; or, 3. That the witness cannot answer the interrogatory without a breach of professional confidence. Another ground has been attempted to be set up as a reason for a defendant's objecting to answer an interrogatory, viz., that it is immaterial to the case; but it has been held, that this ground of objection will not prevail, because it does not concern a witness to examine what is the point in issue (*c*). It is, however, to be observed, that, in a case mentioned in Mr. Swanston's note to *Parkhurst* v. *Low-*

(*a*) Parkhurst v. Lowten, 2 Swanst 203.

(*b*) Vide ante, p. 46.

(*c*) Ashton v. Ashton, 1 Vern. 165; 1 Eq. Ca. Ab. 41, pl. 11, S C.; sed vide Jefferis v. Whittuck, 9 Pri. 486.

Grounds of demurrer.

ten (*d*), a demurrer by a witness to answer an interrogatory defamatory of a third person, and not material to the case, was allowed.

Where answer may subject witness to punishment or to forfeiture.

1. With respect to the first ground of objection to interrogatories by a witness, namely, *that the answer to them may expose him to pains and penalties, or to a forfeiture, or something in the nature of a forfeiture,* the reader is referred to a former part of this treatise (*e*), where the privilege of a defendant to be protected from making the discovery required by the Bill on this ground has been discussed. He will there find, that the privilege in such cases arises from an acknowledged principle of law, that no man is bound to answer so as to subject himself to punishment; and as this principle is applicable as well to witnesses as to defendants, the rules which he will there find laid down with regard to its application to the latter case will be equally applicable to the former.

That answer may subject the witness to a decree against him.

2. The second ground of objection, viz. *that an answer to the interrogatory may lead to a decree against the witness,* is available only in those cases in which the witness is a party to the suit or has otherwise a direct interest in the subject-matter. Considerable doubt appears formerly to have been entertained by the judges, whether a witness was compellable to answer questions, the answer to which might subject him to a civil action or charge himself with a debt; and to settle the law on this subject the Statute 46 Geo. 3, c. 37, was introduced, which declares 'that a witness cannot legally refuse to answer a question relevant to the matter in issue, (the answering of which has no tendency to accuse himself, or to expose him to a penalty or forfeiture of any nature whatever,) on the ground that the answering such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit.'

The right which the parties to a suit have to refuse answering any question, is not, in any degree, affected by this Statute (*f*); and accordingly a defendant to the suit, who is exa-

(*d*) Mulgrave v. Lord Dunbar, 2 Swanst. 198 n.

(*e*) Ante, p. 46. Vide etiam Phil. & Amos, 913.

(*f*) Phil. & Amos, 915.

mined as a witness, may still, as before, demur to answering any interrogatory, whether exhibited on the part of a plaintiff or co-defendant, which may have the effect of enabling the plaintiff to have a decision against him. The right of a defendant to object to the reading at the hearing of the depositions of a co-defendant examined as a witness, in cases where the defendant is interested in the subject-matter to which his evidence relates, so that a decree may be had against him, has been before discussed; it has, however, been discussed with reference to the objection when taken by another party at the hearing; but it is obvious that the right which another party has to take an objection of this nature at the hearing is not one which can serve for the protection of the witness himself; he is, therefore, permitted to protect himself, by demurrer, from the discovery (*g*), in the same manner as he or any other witness would have a right to defend himself from deposing to an interrogatory, the answer to which might expose him to pains and penalties. This right, however, does not extend to protect the witness from answering to facts which will not tend to prove the plaintiff's case against himself, and if he is a witness to a deed, he may be examined as to the execution, although he may demur to any other question (*h*).

Grounds of demurrer.

3. The rules of exemption from discovery *on the ground of professional confidence*, proceed upon the same principles as are applicable to the case of defendants; and the reader is therefore referred for information upon this head to a former portion of this treatise, where these rules have been discussed with reference to the protection of a defendant from answering the Bill (*i*). It may, however, be noticed in this place that, when the objection on this ground does not proceed from the witness, but from the party aggrieved, the way in which the party must proceed to obtain relief is to move the Court to refer it to the Master to inquire which of the matters in the deposition came to the witness's knowledge as confidential At-

That the answer may lead to a breach of professional confidence.

(*g*) Nightingale v. Dodd, 2 Amb. 583; Kildesley v. D'Fisher, Mos. 195.

(*h*) Kildesley v. D'Fisher, ubi supra.

(*i*) Ante, p. 56. Vide etiam Parkhurst v. Lowten, 2 Swanst. 195.

Grounds of demurrer.

torney or Solicitor, &c., and, upon the Master's report, moving to suppress the depositions (k).

Demurrer not necessary where witness declines to produce a document under a subpœna *duces tecum.*

It has been before stated, that the process by which a witness can avail himself of his right to decline answering to any particular interrogatory which has been exhibited for his examination, is a demurrer to the interrogatories: it seems, however, that where a witness is served with a subpœna *duces tecum* to produce a deed or other document, it is not necessary that there should be a written interrogatory as to the fact of his having it in his possession; and that if, upon being asked *vivâ voce* to produce it, he objects to do so, either upon the ground of his having an interest in the deed, or upon any other ground (l), he may refuse to do so without a formal demurrer. The proper course to be adopted by the party in such case is, to move that the witness may attend and produce the deed, and pay the other party the costs occasioned by his previous refusal, upon the hearing of which motion, the Court will decide whether the reasons alleged by the witness, for his refusal, are satisfactory or not (m). In all other cases, however, the witness can only protect himself from answering by demurrer.

Form of demurrer.

There does not appear to be any particular form for a demurrer of this nature (n); but, when a witness who attends for examination, before either an Examiner or Commissioner, conceives that he ought not to be compelled to answer the interrogatory proposed to him, his proper course appears to be, 'to place himself before the Examiner or the Commissioner, exactly in the same state in which a witness at *nisi prius* would submit himself before the Chief Justice; that is, he must submit to their judgment whether he has not stated a sufficient reason for protecting himself from answering (o). If they are of opinion that he ought to answer, and he will not, they must

(k) Sandford v. Remington, 2 Ves. jun. 189.

(l) Such as, that the production of it may prove him to be guilty of a crime. Vide Parkhurst v. Lowten, 2 Swanst. 213.

(m) Bradshaw v. Bradshaw, 1 R. & M. 358.

(n) Morris v. Williams, 2 Moll. 362.

(o) Parkhurst v. Lowten, ubi supra.

(p) Ibid.

take down in writing his reasons for declining to answer (*p*); and if the reasons are founded upon facts which do not appear upon the pleadings, the facts upon which they are founded must, also, be stated upon the oath of the witness (*q*).

Form of.

Must state the facts upon which witness relies.

Thus a witness, demurring on the ground that his answer would violate the confidence reposed in him as a Solicitor, must name the party to whom he was Solicitor (*r*). He must also swear that the facts, from the discovery of which he desires to be protected, came to him in his capacity of Solicitor to a particular person, 'for a Solicitor, like any other witness, is bound to discover all secrets of his client which he did not come to the knowledge of in his relation of Solicitor to his client' (*s*). It must also appear, that the knowledge came to him in the character of a Professional Adviser, and in such character only; and therefore where a demurrer stated that the witness was the Attorney or *agent* for a person, it was considered not to be sufficiently precise, for an agent may be only a steward or servant (*t*).

So where a witness demurred to an interrogatory, because she claimed an interest in the land; it was disallowed, because she did not answer to the interest, nor state what interest she claimed (*u*).

It seems, however, that if the facts, upon which the witness relies as the ground of his exemption, appear upon the record, there will be no necessity for re-stating them in the demurrer; as where the defendant is a party to the suit, and the interest he has in the matter appears upon the pleadings (*x*). And where a witness demurred to answering interrogatories because the answer might subject him to pains and penalties under the Stock Jobbing Act (*y*), an objection taken to the demurrer because it did not state that the witness was either a stock broker or an agent, (which it was necessary

—unless they appear upon the record.

(*p*) Parkhurst v. Lowten, ubi supra.

(*q*) Nightingale v. Dodd, Mos. 228.

(*r*) Parkhurst v. Lowten, 2 Swanst. 201.

(*s*) Morgan v. Shaw, 4 Mad. 54.

(*t*) Vaillant v. Dodemead, 2 Atk. 525.

(*u*) Jefferson v. Dawson, 2 Ch. Ca. 208. Vide etiam Herbert v. Mayn, 2 Swanst. 198 n.

(*x*) Nightingale v. Dodd, Mos. 228; Parkhurst v. Lowten, 2 Swanst. 197.

(*y*) 7 Geo. 2, c. 8.

Form of. he should be, in order to render him liable to the penalties imposed by the act,) was overruled, because the witness was described as a stock broker in the title of the depositions, and also in the title of the demurrer, though not in the demurrer itself (z).

Must be upon oath. In taking down a demurrer, the Examiner ought to take the witness's statement upon oath (a). Where this is not done, the demurrer must be supported by affidavit, as it is necessary the Court should, in some way or other, have the sanction of an oath to the facts on which the objection is founded (b). In effect, however, a demurrer of this nature is an answer put in upon oath, by which the witness swears that he cannot, for the reasons he states, speak to the question (c); and the proper course appears to be, for the witness, while under examination, to state the facts upon which he relies, and his reasons for declining to answer, to the Examiner or Commissioners, who must take them down from such statement as part of his examination upon oath (d), in which case no further affidavit is necessary (e). In *Bowman* v. *Rodwell* (ee), an application made to the Court, after the witness had refused to answer the interrogatories, that he might be at liberty to state his reasons for his refusal, and that the Examiner might deliver to the witness a copy of such interrogatories as he had refused to answer, and certify the reason of his refusal, was dismissed.

Proceedings upon demurrer. When the demurrer is taken upon an examination in London, the Examiner gives notice to the opposite party, and furnishes him, if required, with a copy of the demurrer (*f*); and this, it seems, he does without order (*g*). When the examination is taken under a commission, the Commissioners must return the demurrer with the commission in the usual manner; after which the party exhibiting the interrogatories may procure an order 'that the plaintiff's Clerk in Court do deliver over the commission and return to the two senior Six

(z) Davis v. Reid, 5 Sim. 443.
(a) Parkhurst v. Lowten, 2 Swanst. 203.
(b) Ibid.
(c) Morgan v. Shaw, 4 Mad. 54.
(d) Bowman v. Rodwell, 1 Mad. 266.
(e) Morgan v. Shaw, ubi supra.
(ee) Ubi supra.
(*f*) 1 Smith's Ch. Pr. 382.
(*g*) Potts v. Curtis, 1 Younge, 304; *secus* in the Court of Exchequer. Ibid.

Clerks not towards the cause, and that such two senior Six Clerks do open the same, and deliver over to the Clerk in Court for the plaintiff (or defendant) copies of the depositions and the demurrer of the witness, but that such delivery is not to be considered as publication'(*h*).

Proceedings upon.

Of setting down.

A demurrer to interrogatories may be set down for hearing before the Court in the same manner that demurrers to Bills are set down. And an order by Sir John Leach, M. R., for striking a demurrer by a witness out of the paper of demurrers, as not being properly set down amongst such demurrers, was reversed by Lord Eldon, and the demurrer ordered to be restored (*i*).

Of overruling demurrer;

If the Court, upon argument, considers the demurrer to be bad, it will overrule it; in which case an order will be made that the witness, if the examination has been in town, may go before the Examiner, and be examined, or stand *committed*(*k*).

—without prejudice to another;

Sometimes, however, where the ground for overruling the demurrer has been its informality, and the Court has considered that the witness may have a good reason to be excused from answering, it will order the demurrer to be overruled, without prejudice to the witness objecting or demurring, upon his re-examination, to the interrogatories, or to any part thereof, as he may be advised, upon such grounds as he shall state in such objections or demurrer (*l*).

In such cases, when the witness has been examined under a commission, the Court will also, if asked, direct a new commission to issue for the re-examination of the witness, with a similar proviso (*m*).

—partially.

Sometimes the Court will allow a demurrer to interrogatories partially, and overrule it as to the rest. Thus, in *Davis* v. *Reid*(*n*), where a demurrer was put in to two interrogato-

(*h*) Vide Parkhurst v. Lowten, 2 Swanst. 220. Vide etiam Smithson v. Hardcastle, 1 Dick. 96, where the order appears to be slightly different.

(*i*) Parkhurst v. Lowten, ubi supra.

(*k*) Parkhurst v. Lowten, 2 Swanst. 202.

(*l*) Morgan v. Shaw, 4 Mad. 54; Parkhurst v. Lowten, 2 Swanst. 206.

(*m*) Parkhurst v. Lowten, ubi supra.

(*n*) 5 Sim. 118

Demurrer to interrogatories.

ries, the Vice-Chancellor allowed the demurrer as to one and part of the other.

Costs of demurrer;

The costs of a demurrer to interrogatories appear to be governed by the same rules as those of demurrers to Bills; and, formerly, if they were overruled, the same sum, viz. 5*l.*, was allowed to the other party for costs as in the case of ordinary demurrers (*o*). It has, therefore, been held, that the 33d Order of 1828 (*p*), applies to demurrers of this nature (*q*).

—where partially overruled.

In *Davis* v. *Reid*, above referred to, where a demurrer was partially allowed, the Vice-Chancellor directed, that half the costs should be paid by the witness, in analogy to the practice when two exceptions are taken, one of which succeeds and the other fails.

Sect. VII.

Publication.

What.

Publication, in a legal sense, is the open shewing of depositions, and giving copies of them to the parties, by the Clerks or Examiners in whose custody they are (*a*).

By the Orders of the Court, the depositions of witnesses are not to be disclosed by any of the persons before whom they were taken, or by their Clerks, but are to be closely kept, if taken in town, by the Examiners at their office; if by Commissioners in the country, by the sworn Clerk to whom the commission, after its execution, was delivered, until publication passes.

By consent.

Publication passes, either by consent or by rule. When both the plaintiff and defendant have examined such witnesses as they think proper, and are ready to go to a hearing, the Clerks in Court on both sides may pass publication by consent, which is done by signifying the same in one of the rule-books of

(*o*) Parkhurst v. Lowten, ubi supra; Shepherd v. Downing, 2 Swanst. 195 (n.); Vaillant v. Dodomede, 2 Atk. 592.

(*p*) Ante, p. 96.

(*q*) Sawyer v. Birchmore, Law J. xiii. p. 249.

(*a*) Prac. Reg. 353.

the Six Clerk's Office, upon which publication immediately passes (*b*).

By rule.

A rule to pass publication is in the nature of an order of the Court, directing that publication shall pass unless cause is shewn by the other side. Before a rule to pass publication can be entered, it is necessary, in most cases, that there should have been a previous order or rule called a *rule to produce witnesses*. This rule, which is, in fact, a notice given by one side to the other to proceed with the examination of his witnesses, is sometimes called the *ordinary rule*.

Rule to produce witnesses.

By Lord Clarendon's Orders, it is directed, that after witnesses 'examined *in Court*, there shall be two rules only given for publication, viz. an ordinary rule, and then a day to shew cause why publication should not pass: and upon the return of a commission, one rule only to be given, within which times aforesaid, if the other side do not shew unto the Court good cause to the contrary, publication shall pass accordingly' (*c*). It is to be observed, that the latter part of the above order, which directs, that, upon the return of a commission, one rule only shall be given, is altered by the 17th of Lord Lyndhurst's Orders, as amended in 1831, whereby it is directed, 'that a plaintiff who requires a commission to examine witnesses shall give his rules *to produce witnesses*, and pass publication, at the latest, in the second term next following the service of his order for a commission.' So that now, when the case comes within the provisions of the 17th Order by the plaintiff's serving an order for a commission within the time there specified, the ordinary rule must be given, as well as a rule to pass publication. Where, however, the case does not come within the 17th Order, a rule to pass publication, only, is necessary. Thus, where a commission has been issued to examine witnesses abroad, a rule to pass publication may be entered on the return of the commission, without a previous rule for the production of witnesses; and it is presumed the case will be the same where the defendant sues out a commission under any of the circumstances before mentioned (*d*) as entitling him

In what cases necessary.

Where no commission.

Where a commission has been issued under the 16th and 17th Orders.

Secus where under the old practice.

Commission abroad;

—or sued out by defendant;

(*b*) 1 Harr. (Ed Newl.) 285.
(*c*) Beames's Ord. 190.
(*d*) Ante, p. 491.

By rule.

—unless under the 17th Order.

to do so under the old practice, as it existed previously to the Orders of 1828. It is, however, to be remarked, that, whenever the plaintiff has served an order for a commission, within the time limited by the 17th Order, or by the order entered into upon his undertaking to speed, under the 16th Order, he will have brought the case under the operation of the 17th Order; so that, although he does not sue out a commission under the order, or, having sued one out, does not execute it, and a commission is, in consequence, sued out by the defendant, the plaintiff must, nevertheless, give a rule to produce witnesses, as well as a rule to pass publication, otherwise he will be liable to have his Bill dismissed (*e*).

By whom entered.
By plaintiff,
—within what time.

Rules to produce witnesses are most commonly entered by the plaintiff either before or soon after he has begun to examine his witnesses in London. No particular time, however, is limited, within which a plaintiff is bound to give a rule to produce witnesses, unless in cases where an order for a commission to examine witnesses in the country has brought the cause within the operation of the 17th Order, in which case, as we have seen, the plaintiff must not only obtain and serve an order for a commission within three weeks from the filing of his replication, (or from his entering into the undertaking required by the 16th Order of 1831,) but he must give his rules to produce witnesses and pass publication, at the latest, in the second term next following the service of the order for the commission (*f*).

Duration of rules.

In order to understand this part of the Order, it is necessary to observe, that rules to produce witnesses and to pass publication are what are termed *eight day rules*, that is to say, the party entering them cannot proceed till the eighth day after the day of entering (*g*). Thus a party entering a rule to produce witnesses cannot enter a rule to pass publication till the eighth day after the day of entering the rule to produce, nor can publication be passed, under a rule to pass publication, till the eighth day after the entry of the rule; consequently, in order to comply with the exigency of the 17th Order, the rule

(*e*) Vide 1 Smith's Ch. Pr. 385, and Whalley v. Pepper, 8 Sim. 203.

(*f*) Order 1831, XVII.

(*g*) Hind. p. 320.

to produce witnesses must be entered by the plaintiff on the sixteenth day before the last day of the term in which the commission is returnable; otherwise it will be impossible for him to comply with the order, and he will be liable to have his Bill dismissed (*h*).

By rule.

We have seen before, that where a plaintiff, after serving a subpœna to rejoin, omits to proceed in the cause, the defendant is at liberty to give a rule to produce witnesses; he cannot, however, do so, before the expiration of one clear term from the service of the subpœna to rejoin, after which he may give the rule, and then, at the expiration of another clear term, enter a rule to pass publication (*i*).

By defendant.

A rule to produce witnesses is a mere memorandum, and is entered by the Clerk in Court of the party on whose behalf it is given in the House-Book of the Six Clerks' Office in that Six Clerk's division where the cause originally begun (*k*). The entry is in the following form:—

Form of the rule to produce witnesses.

A. B. v. *C. D.* — *20th June,* 1838.
A day is given to the [defendant or plaintiff] *to produce witnesses.*

X. Y., *Clerk for* [plaintiff or defendant.] (*l*).

This entry is transcribed by the Clerk in Court entering the rule into his own rule-book, which is taken to the entering Registrar, who, upon receiving the usual fee, sets his initials to the rule in the Clerk in Court's book, and makes an entry of it in the Registrar's book. This is called entering the rule. When it is accomplished, the Clerk in Court who enters it must give notice in writing to the adverse Clerk in Court of his having done so (*m*).

Entry of.

It is to observed, that these rules may be entered on any day in term, but they must be so entered that they may expire within the term in which they are entered; consequently, rules

—must expire within the term in which entered.

(*h*) Vide Whalley v. Pepper, 8 Sim. 203. A defendant, however, is not at liberty to give a notice to dismiss until the whole time allowed by the order has expired, although compliance with the order has become impossible. Ibid.

(*i*) Ante, p. 377. Vide Walmsley v. Elliott, 1 Dick. 84.

(*k*) Hind. 320.

(*l*) Ibid. 321.

(*m*) Ibid.

By rule.

to produce witnesses must be entered eight days before the expiration of the term in which they are entered, otherwise they must be entered in the ensuing term (*m*); and where a plaintiff has served an order for a commission to examine witnesses in the country, the rule to produce witnesses, if deferred till the second term after service of the order for the commission, must, as we have seen, be entered sixteen days at the least before the expiration of that term.

Rule to pass publication

—when to be entered.

If the rule to produce witnesses has been entered on the part of the plaintiff, he must wait till the seven clear days from the day of entering the rule have expired, before he can give a rule to pass publication; then, *i. e.* on the eighth day, he may enter a rule to pass publication, care being taken, if he has sued out a commission to examine witnesses in the country, that the eighth day shall expire within the term in which the commission is returnable. It is to be recollected, however, that a defendant may, after a rule to produce witnesses has been entered, sue out a commission to examine witnesses, and that the effect of his so doing will be to suspend the right of the plaintiff to enter a rule to pass publication till the following term (*n*).

After commission sued out by defendant.

Where the rule to produce witnesses has been entered by the defendant, he must wait till the expiration of one clear term after he has given the rule, before he can give a rule to pass publication (*o*).

Form of rule.

A rule to pass publication is entered in the same manner as the ordinary rule to produce witnesses, and is generally in one of the following forms:—

A. B.
v.
C. D.

17*th November*, 1838.

A day is given to the defendant, (or plaintiff,) *to shew cause why publication should not pass.*

X. Y., Clerk for plaintiff.

(*m*) Hind. 379.

(*n*) Ante, p. 492.

(*o*) Anon. 5 Sim. 498, and ante, p. 377. This, however, is somewhat at variance with the practice as laid down in Hinde. p. 380, where it is said, 'it seems as if a defendant should wait the term in which he appears to rejoin before he gives the ordinary rule to produce witnesses: the other rules he may give *pari passu* with the plaintiff.'

By rule.

A. B. v. C. D. 22nd November, 1838.

A day is given to the defendant (or plaintiff,) *for passing publication, upon a joint commission returned.*

X. Y., *Clerk for plaintiff* (*p*).

Notice of, upon Clerk in Court,

When the rule has been entered, notice in writing of its entry must be given to the Clerk in Court of the other side, in the same manner as notice of the entering the ordinary rule is given.

—and upon Examiner and Clerk in Court having the custody of the depositions.

A copy of the rule should also, when witnesses have been examined in London, be served upon the Examiner, and when witnesses have been examined in the country under a commission, upon the Clerk in Court, in whose custody the depositions are (*q*), as, without such service, those officers will not consider themselves authorized in delivering out copies of the depositions.

After order expired, publication passes of course, —unless enlarged. *Secus*, where a commission has been issued under the 17th Order.

When the seven days from the date of the rule to pass publication, have expired, publication passes as of course, unless the Examiner or the Clerk in Court, in whose custody the depositions are, shall have been served with an order to enlarge publication; or unless a commission has been issued at the instance of a defendant, under the provisions of the 17th Order, for the examination of witnesses in the country, the time allowed for the return of which has not expired, in which case, as we have seen, publication is directed, by the 17th Order, to stand enlarged until the commission shall be returnable (*r*).

Publication, how compelled.

It seems that, in strictness, the Examiner or Clerk in Court, in whose custody the depositions are, would be obliged to pass publication and deliver out copies at the request of an adverse party, unless, on or before the day when the rule or order to pass publication expires, or the commission, (if issued at the instance of a defendant, under the 17th Order,) is returnable, an order to enlarge publication shall have been obtained and served, and that, upon his refusal so to do, the Court will, upon application by motion, supported by affidavit of the service of the rule or order for passing publication and of the demand and refusal, make an order

(*p*) Hind. 380.
(*q*) Ibid. 381.
(*r*) Ante, p. 500.

Enlargement of publication.

upon the Examiner or Clerk in Court to publish and give out copies of the depositions, and very possibly expect from him some excuse accounting for his conduct (*s*); and it is stated that, unless the Examiner or Clerk in Court should assign some reasonable cause for refusing publication and withholding the copies of the depositions, the Court may order him to pay the costs of the application and reprimand him for his misbehaviour. In such case, however, if it is intended to make a personal application against the Examiner or Clerk in Court, there should be a personal service of the notice of motion upon him as well as the ordinary service upon the adverse Clerk in Court (*t*).

Application to enlarge publication, —must be made to a Master.

Formerly, applications to enlarge publication were made by motion in Court, or by petition at the Rolls, but, by the Statute 3 & 4 W. 4, c. 94, ss. 13 & 14, all applications to enlarge publication must be made to one of the Masters in ordinary, and no such application can be heard by any of the Judges of the Court, except upon appeal, by motion, from the Master's order, the order made upon which appeal is to be final and conclusive. This Statute has, however, been held not to apply to motions to enlarge publication, after publication has actually passed upon affidavit that the depositions have not been seen, &c., which, although they are, in form, applications to enlarge publication, are in effect applications *for leave to examine witnesses notwithstanding publication has passed* (*u*).

Supported by affidavit.

Application, how made.

According to the 18th of Lord Lyndhurst's Orders (*x*), applications of this nature must be supported by affidavit, and must be at the cost of the party making it, unless otherwise ordered by the Court, *i. e.* by the Master to whom the application is made.

The mode of making the application is by warrant, in the manner before pointed out (*y*). If the application is made by the plaintiff, he must serve all the defendants with the war-

(*s*) Hind. 381.

(*t*) Ibid.

(*u*) Carr v. Appley, 2 M. & C. 476.

(*x*) Ord. 1828; amended, 1831. The same order directs, that publication shall not be enlarged except upon special application to the Court; but all applications to the Master under the 3 & 4 W. 4, c. 94, s. 13, are in the nature of special applications.

(*y*) Ante, v. 1, p. 543.

rant. If it is made by a defendant, he is only bound to serve the plaintiff and not his co-defendants(*z*).

Enlargement of publication.

In what cases granted.

Where the cause has not been set down, or where the party has not been served with a subpœna to hear judgment, the Master will enlarge the publication, upon the simple statement of that fact upon the affidavit. In such cases, however, the order will be made, provisionally, so as not to hinder the plaintiff from setting down his cause in the mean time(*a*).

Where cause not set down.

After cause set down.

Publication will also be enlarged after the cause has been set down, and a subpœna to hear judgment served, if it can be shewn, to the satisfaction of the Master, that it is not possible for the cause to come on very soon. In such cases the Court will expect the party to undertake to appear to hear judgment *gratis*, on six days' notice to his Clerk in Court, and pray no day over, and will frequently compel him to extend his undertaking, so as to oblige himself to take no objection for want of parties at the hearing(*b*).

Although previously enlarged.

In most cases the Court will enlarge publication, and give a party an opportunity of examining witnesses, even though publication should have been enlarged by a precedent order, if any ground for doing it can be shewn and verified by affidavit(*c*); as where witnesses reside in parts of the kingdom which are at any distance from each other, or where the party applying has not been able to examine all his witnesses under a joint commission, executed in the cause, by reason of some of the witnesses residing at a great distance from the party, and others at a great distance from the place of executing the commission; or where witnesses have refused or neglected to attend before the Commissioners; or by any accident have not been examined at the execution of the commission(*d*). In *Barnes* v. *Abram*(*e*), publication, though often enlarged before, was enlarged again in order to enable the defendant in a tithe cause to search for records in the Vatican, upon affidavit as to the probability of success there.

Where cross Bill has been filed.

Where a cross Bill has been filed before the original suit has been proceeded in, and the defendant to the cross suit, (who is

(*z*) 1 Smith's Ch. Pr. 388.
(*a*) Hind. 380.
(*b*) 1 Harr. Ed. Newl. 287.
(*c*) Hind. 383; Moody v. Leaming, 1 Mad. 85.
(*d*) Hind. 383.
(*e*) 3 Mad. 103.

Enlargement of publication.

the plaintiff in the original suit,) has not put in an answer to the cross Bill, the plaintiff in the cross suit may have publication enlarged in the original suit till a fortnight after the answer to the cross Bill shall have come in, as the discovery afforded by such answer may be of service to him in framing his interrogatories (*f*). Formerly there was a distinction, in this respect between cases in which the cross Bill was filed before the original suit had been proceeded in, and those in which it was not filed till afterwards. In the former instance the order might be obtained on motion or petition of course (*g*); but in the latter, notice of motion was necessary; now, however, as has been before observed, no distinction of this nature exists (*h*).

It seems, however, that after proceedings have been taken in the original cause, publication can only be enlarged where the defendant in the cross cause is in contempt (*i*), unless a special case is made. In *Cook* v. *Broomhead* (*k*), where the cross Bill was not filed, till after a rule to pass publication had been entered in the original suit, and the defendant in the cross suit was not in contempt, a motion by the plaintiff in the cross suit, to enlarge publication, which was not founded upon any special grounds, was refused with costs.

It may be mentioned here, that the Court of Exchequer has determined, that an order to enlarge publication till the coming-in of the answer in a cross cause, shall not be granted, unless upon affidavit of the truth of the facts stated in the cross Bill, and that the answer may furnish a good defence to the original Bill (*l*). It is not necessary, however, that such affidavit should be made by the party himself, but if made by his Solicitor, it will be sufficient (*m*).

After publication has passed.

Sometimes, when, by accident or surprise, publication passes before a party has examined his witnesses, and there has been no blameable negligence, publication will be enlarged, even after the depositions have been delivered out, upon affi-

(*f*) Creswick v. Creswick, 1 Atk. 291. Vide etiam Ramkissenseat v. Barker, 1 Atk. 19.

(*g*) Aylet v. Easy, 2 Ves. 336.

(*h*) Ante, p. 568.

(*i*) Creswick v. Creswick, ubi supra; Dalton v. Carr, 16 Ves. 93.

(*k*) Ibid. 133.

(*l*) Edwards v. Morgan, 11 Pri. 399.

(*m*) Lowe v. Firkins, M'Lel. 10; 13 Pri. 21. S. C.

davit that they have not been read. Such an order, however, cannot be made unless some cause is shewn why the witness was not examined before (*n*). And it is a rule of the Court, that the party, as well as his Clerk in Court and Solicitor, must make oath that they have never seen, read, nor been informed of the contents of the depositions taken in the cause, nor will they, &c., till publication is duly passed (*o*).

Enlargement of publication.

Upon affidavit that party, &c., has not seen the depositions.

An instance is mentioned in the books, having occurred in Lord Somers's time, in which the Court granted an order to enlarge publication after it had actually passed, although the rule of the Court above stated could not be complied with; but in that case the Solicitor on the other side, being an artful man, having procured copies of his client's depositions, immediately went with them to the adverse Solicitor, and shewed him the depositions, and read them over to him; the Solicitor, being ignorant of the rule, told him he must, notwithstanding, have an opportunity of examining his witnesses, and soon after took his witnesses to the Examiners's Office, where he was told they could not be examined, because publication was passed and the depositions delivered out. The Solicitor, surprised at this, went to his Clerk in Court to know what he was to do, and told him the whole story, which being laid before the Court, it enlarged publication, and gave the party an opportunity to examine his witnesses, and the adverse party narrowly escaped commitment for his misconduct (*p*).

Granted in one case without the usual affidavit.

Where a defendant obtained an order to enlarge publication upon an allegation that it had not passed, which was untrue, the order was held to be informal, and an application, upon the usual affidavit, that publication might be again enlarged, or the evidence taken under the informal order, read at the hearing of the cause, was dismissed with costs (*q*).

Publication enlarged upon an untrue allegation, informal.

It seems that the Court will not only enlarge publication, upon the proper affidavits, after publication has actually passed, but it will, if a proper case is made, even grant a second commission to examine witnesses, upon being satisfied,

Commission granted after publication.

(*n*) 1 Harr. (Ed. Newl.) 289.

(*o*) Ibid. Sed vide Lawrell v. Titchborne, 2 Cox, 289.

(*p*) 1 Harr. (Ed. Newl.) 289.

(*q*) Conethard v. Hasted, 3 Mad. 429.

Enlargement of publication.

by affidavit, that the party applying, his Solicitor, and Clerk in Court, are ignorant of the contents of the depositions (*r*). An application for this purpose should be made to the Court by motion, and not to a Master, who has no authority to entertain it (*s*).

The form and manner of entering special orders by the Masters, under the 3 & 4 W. 4, c. 94, has been before pointed out (*t*). When an order to enlarge publication has been made, a copy of it must be served, not only upon the Clerk in Court on the other side, but upon the Examiner who took the depositions and the Clerk in Court in whose custody the depositions, if taken by commission, are, on or before the day on which publication actually passes (*u*).

Service of the order.

This is necessary, as well to authorize the giving out copies of the depositions, and to preclude further examination after the period to which publication has been enlarged, as to authorize the examination of further witnesses (*x*).

After publication enlarged, the other side may cross examine and examine at large.

It is a fixed rule of the Court, that if one of the parties, after publication has passed, obtains an order to enlarge publication, upon the usual affidavit, the other party may not only cross-examine, but may examine at large, even though he has seen and read the former depositions (*y*).

Adjournment of cause, where necessary;

Where a cause has been set down for hearing, and publication is enlarged beyond the day on which the same is set down to be heard, the proper course, if the cause is likely to come on before the depositions are ready, is to apply to the Court for an order to adjourn the hearing for a certain time. An application for this purpose must be made to the Court (*z*) upon motion, of which notice has been duly served, and the order made thereon should be served, in the usual manner, upon the adverse Clerk in Court, before the day on which the cause is to be heard, otherwise the cause, when called on, will be struck out of the paper (*a*).

—how procured.

(*r*) Turbot v. ——, 8 Ves. 315. Vide etiam Dingle v. Rowe, Wightw. 99; Cutler v. Cremer, Mad & Geld. 254. Sed vide Mineve v. Row, 1 Dick. 18.

(*s*) As to the cases in which the Court will grant a second commission, vide ante, p. 517.

(*t*) Ante, v. 1, 544.

(*u*) Hind. 381.

(*x*) Ibid.

(*y*) Anon. 1 Vern. 253.

(*z*) 1 Smith's Ch. Pr. 388.

(*a*) Hind 385, 6.

The practice of the Court with regard to the publications of depositions taken *de bene esse* has been already stated; the publication of evidence taken *in perpetuam rei memoriam* will be the subject of future discussion.

Of depositions taken *de bene esse*; —*in perpetuam rei memoriam.*

Publication being passed, the Examiner or Clerks in Court in whose custody the depositions are, are at liberty to permit them to be examined, and to deliver copies of them to the parties.

Effect of publication.

By the 31st of Lord Brougham's Orders (*b*), all office-copies in all offices of the Court are to be written on foolscap paper, bookwise, and are to contain two folios on each page, (except office-copies of Bills, which are to contain only one folio,) such folios to consist of ninety words each, and to be reckoned as to schedules according to the General Order of the 28th of November, 1743 (*c*).

Office-copies;

An office-copy of the depositions must, before it is delivered out of the office, be subscribed by the Six Clerk or Examiner in whose office the depositions are copied (*d*); and by an Order of the Court dated the 19th January, 1695, (which appears to have been made for the purpose of checking a practice, then prevalent, of one of the parties only taking office-copies of the depositions from the Examiner, and afterwards allowing copies of such office-copies to be taken by the other side,) it is ordered, that no copy of depositions shall be read or made use of, either in Court or before any Master in any cause, but such as is taken out of the proper office, and signed for the party for whom the same shall be read (*e*); and by the same Order it is provided that the Examiners shall, by themselves or their deputy, have liberty to attend in Court at the hearing of all causes, to inspect all books of depositions which are brought into Court, and read either for plaintiff or defendant, and to see whether they be duly signed for the party producing the same; and that, in case the Examiners, or either of them, or their deputy, shall discover to the Court any such fraud or practice committed, then that the cause or causes wherein such practice or fraud is committed shall be put off, and the

—must be signed by the Six Clerk or Examiner, —for the party by whom they are offered to be read.

(*b*) Ord. 1833.
(*c*) Beames's Ord. 369.
(*d*) Hind. 304.
(*e*) Beames's Ord. 300.

Publication.

parties offending shall stand committed to the prison of the Fleet until the officer injured be agreed with and paid his due fees, and until they shall have also paid the sum of 5*l.* into the hands of such person as his Lordship shall direct, for the use of the poor, and until such client or clients as shall be prejudiced by putting off his or her cause shall be reimbursed his or her charges in respect thereto, and until the further order of this Court (*f*).

Copy of interrogatories annexed to depositions.

When an office-copy of the depositions taken on behalf of an adverse party is delivered out, a copy of the interrogatories whereon such depositions were taken is always annexed (*g*).

Sect. VIII.

Of suppressing Depositions.

The depositions being published, those taken by the adverse party must, together with the interrogatories upon which they are taken, (a copy of which, as we have seen above, is always annexed to the office copy of the depositions,) be carefully examined by the Solicitor, in order that, if any ground appears for suppressing them, or any of them, application should be made to the Court to suppress them.

Upon what grounds depositions will be suppressed.

The ground upon which the Court will suppress depositions, is, either that the interrogatories upon which they have been taken are leading (*a*); or that the interrogatories and the depositions taken upon them, or the depositions alone, are *scandalous* (*b*); or else that some irregularity has occurred in relation to them. A deposition may also be suppressed, because a witness has disclosed some matter which has come to his knowledge as Solicitor or Attorney for the party applying (*c*),

(*f*) Beames's Ord 300.

(*g*) Hind. 394.

(*a*) As to what will constitute a leading interrogatory, vide ante, p. 469.

(*b*) For the rules of the Court as to scandal in interrogatories, vide ante, p. 469.

(*c*) Sandford v. Remington, 2 Ves. Jr. 189.

Course of proceeding, because interrogatories are leading.

The proper course to pursue, when a party is advised that the interrogatories upon which a witness has been examined are leading, is to apply to the Court, by motion, that it may be referred to a Master to look into the interrogatories, and certify whether the same be leading or not (*d*). This is a motion of course (*e*); but a copy of the order made upon it, when drawn up, passed, and entered, must be served upon the adverse Clerk in Court *personally*, or left with his agent at the Six Clerks' Office, shewing him, at the same time, the original order passed and entered (*f*).

Service of order;

—upon Master.

The original order, passed and entered, must be produced at the Master's Office to whom the reference is made, and a true copy thereof left with him. The Master's Clerk will thereupon give out a warrant, which usually appoints an attendance the next day but one from the day on which the warrant is taken out, unless such day happens to be Sunday, in which case the attendance will be fixed for the Monday. A copy of the warrant must be served upon the adverse Clerk in Court, in like manner as the copy of the order for the reference the day next but one before the day on which the attendance is appointed, unless such day happen to be Sunday (*g*).

Warrant to attend.

Service of, upon Clerk in Court.

It is to be recollected, that, by the 59th of Lord Lyndhurst's Orders (*h*), every warrant for attendance before the Master is to be considered peremptory; the parties must, therefore, attend at the time and place appointed by the first warrant, and then, if both parties are present, upon the order of reference and an office-copy of the interrogatories referred being produced, the Master proceeds to hear the arguments on each side. If the adverse party should not attend the warrant, the Master, (the service of the warrant having been duly verified by the oath of the person who served it,) will proceed upon the reference *ex parte* (*i*).

Master's warrant peremptory.

Proceeding before Master.

Ex parte.

(*d*) If the depositions are to be read at law, an objection because the interrogatories are leading cannot be taken at the trial, but must be made in the Court in which the depositions are taken. Williams v. Williams, 4 Maule & Selwyn, 497

(*e*) White v. Fussell, 19 Ves 112; Osmond v. Tindall, Jac. 625, and the cases there cited.

(*f*) Hind. 394.

(*g*) Vide ante, p. 314.

(*h*) Ord. 1828

(*i*) Hind. 395.

Because the interrogatories are leading.

The Master, having heard the case, certifies his opinion upon it to the Court; and if he finds an interrogatory, or part of an interrogatory, to be leading, he points it out in his certificate (*k*).

Master's certificate;
—does not require confirmation.

The Master's certificate, although in the nature of a report, does not require any application to the Court to confirm it; no objections to it, therefore, can be brought into the Master's office; this, however, does not preclude the party from taking the opinion of the Court upon the Master's decision, by exceptions to the certificate, which are to be taken and proceeded upon in the ordinary mode of excepting to reports (*l*), care being taken not to file the exceptions till the report has been filed (*m*).

When interrogatories are certified to be leading.

If the Master certifies the interrogatories, or any of them, to be leading, the next step is to have the depositions taken thereon suppressed.

Reference back to suppress depositions.

In order to effect this, the Master's certificate must be filed, and then an order may be obtained *as of course* (*n*) to 'refer it back to the Master to expunge the interrogatories, and to mark the depositions in answer thereto, and that such depositions do stand suppressed, and that the Clerk in Court or the Examiner with whom the interrogatories are filed, or his sworn Clerk, as the case may be, do attend the Master with the interrogatories and depositions for that purpose.' The order also refers it to the Master to tax the costs of the party applying in respect of the interrogatories being leading, and of the application, and incident thereto, and directs that such costs be paid to the party applying by the other party (*o*).

The proceedings upon this order are the same as those upon the first reference; but previously to acting upon the order, it ought, besides the usual service upon the Clerk in Court on the other side, to be served upon the Examiner, (if the deposition was taken in town,) or, (if the examination was taken

(*k*) Ibid.

(*l*) Vide ante, p. 328.

(*m*) Ibid.

(*n*) 1 Smith's Ch. Pr. 355, and vide Osmond v. Tindall, 1 Jac. 625. In Hind. p. 396, it is laid down, that this order must be obtained upon motion, of which notice has been given. Vide etiam 1 Turn. & Ven. 237.

(*o*) 1 Smith's Ch. Pr 355.

in the country,) upon the Clerk in Court in whose custody the depositions are, who must attend the Master with the depositions, in order that the Master may mark such of them as he considers to be in answer to the expunged interrogatories.

Because the interrogatories are leading.

It is to be observed, that, if the Master has certified all the interrogatories to be leading, and no exception is taken to his certificate, all the depositions taken upon those interrogatories must be suppressed, and so if one interrogatory only be reported leading, the deposition to that interrogatory alone ought to be suppressed, and if part of an interrogatory be reported leading, so much only of the deposition as relates to or answers the leading part (*p*).

Where all the interrogatories are leading; —where some only are leading.

The Master, having complied with the direction in the order, issues his certificate thereof, which must be filed in the Report Office in the usual manner (*q*).

Master's certificate.

It is to be observed, that after depositions have been suppressed, because the interrogatories upon which they were taken are leading, the Court will not usually permit the witness to be examined again. In some special cases, however, a re-examination of the witness has been allowed (*r*).

Re-examination of witnesses;

When an objection is taken to depositions on the ground of scandal, either in the interrogatories and depositions or in the depositions themselves, the course of proceeding is nearly the same as upon an objection because they are 'leading,' except that, as such an objection brings the case within the XIth of Lord Lyndhurst's Orders (*s*), *exceptions in writing* to the interrogatories and depositions must be filed before the order to refer them to the Master is procured (*t*). The order of reference must also contain a direction to the Master to expunge every such scandalous matter as he shall certify to be contained in the interrogatories and depositions, or either of them, which shall have been the subject of reference (*u*).

On the ground of scandal in the *interrogatories* or in the *depositions*.

Exceptions must be previously filed.

(*p*) Hind. 358.

(*q*) Ibid.

(*r*) Spencer v. Allen, Prec. in Chan. 493; Lord Arundel v. Pitt, Amb. 585; post, 582.

(*s*) Ord. 1828.

(*t*) Ante, v. 1, p. 456.

(*u*) Ord. 1828, XII. For the rules which regulate the practice, the reader is referred to v. 1, p. 457.

For scandal.

Costs of scandal.

With respect to the costs of scandal in interrogatories and depositions, if an interrogatory contains, or leads to, scandal, the costs occasioned by it should be borne by the party exhibiting it; but with respect to the costs of the depositions, the rule does not appear to be very accurately definable. We have seen before (*x*), that in a case before Lord Hardwicke (*y*), where a witness, on the execution of a commission, had sworn reflecting words, an order to fix him with costs was discharged, it being considered the fault of the Commissioners to take down such depositions. But it is to be observed, that, in the above case, the interrogatory did not lead to the scandal, since it was contained in the answer to the last general interrogatory; and it appears to have been the opinion of the Reporter, that if it had done so, it would have led to a different determination (*z*).

It is to be recollected, that, by the 22nd of Lord Brougham's Orders (*a*), the Master to whom a reference for scandal or impertinence has been made, is at liberty, without further order, to tax the costs of such reference and consequent thereon, and to direct by whom the same shall be paid, and that the same are recoverable by *subpœna*.

Interrogatories not referred for impertinence alone;

—until the hearing.

It has been before stated that no objection will lie t[illegible] rogatories for impertinence alone, unless accompa[illegible] scandal (*b*). The same observation will apply to dep[illegible]s, which can be referred for scandal only (*c*). It see[illegible] however that the Court will, at the hearing of the cause, entertain an application to refer interrogatories and depositions for impertinence alone, the reason of the distinction being, that scandal affects the character, but impertinence only affects the person, and the Court may afterwards set that right (*d*). It has been before stated, that, under Lord Clarendon's Orders, the Examiners, in case they permit a witness to run into the impertinences there pointed out, are to recompense the

(*x*) Ante, p. 513.
(*y*) Anon. 2 P. Wms. 405.
(*z*) Ibid. notis.
(*a*) Ord. 1833.
(*b*) Ante, p. 469.
(*c*) Osmond v. Tindall, Jac. 627. Vide etiam Pyncent v. Pyncent, 3 Atk. 557.
(*d*) Osmond v. Tindall, ubi supra.

charge thereof to the party grieved, as the Court shall direct (*e*).

For impertinence.

Secus where they are for the purpose of discrediting other witnesses.

The rule that impertinence only, either in the interrogatories or in the depositions, is not the subject of reference before the hearing, is liable to exception in the case of impertinence arising from the examination of witnesses to discredit other witnesses, without a special order to authorize it, in which case the depositions and the interrogatories may be referred for impertinence either before or after publication (*f*).

On the ground of irregularity;

If it is discovered, that any material irregularity has taken place in the mode of examining witnesses, either by the Examiner or by the Commissioners, or in the suing out, executing, or returning the commission, or in the proper keeping of the depositions, an application should be made to the Court to suppress the depositions. The grounds upon which such applications may be founded may be collected from the statement of the practice contained in the preceding sections.

—refused.

But though the Court is, in general, strict in insisting upon the punctual observance of its rules of practice with regard to the examination of witnesses, yet, when it sees that the irregularity has arisen from mistake, and that the party committing it has acted *bonâ fide*, it will, especially in cases where the other has done any thing which may have sanctioned the proceeding, refuse to suppress the depositions. Thus where a commission issued on the application of the plaintiff, in which the defendant joined, and under it the plaintiff's witnesses were examined, after which it was discovered that the title of the cause had been mistaken in the commission, upon an application to suppress the depositions, the Lord Chancellor, (Lord Cowper,) refused to do so, but ordered the Six Clerk to amend the commission in respect of the title of the cause, and directed that the plaintiffs should be at the costs of the motion, and also at the expense of sealing a new commission for the examination of the defendant's witnesses (*g*). So, as we have seen, where a witness was inadvertently examined without an order, two

Where the other party has sanctioned the proceeding.

(*e*) Ante, p. 482.

(*f*) Mill v. Mill, 12 Ves. 406.

(*g*) Robert v. Millechamp, 1 Dick. 22.

For irregularity.

days after publication had passed, and the other party had cross-examined him, the Court would not suppress his evidence (*h*). So, likewise, where Commissioners abroad took the examination of witnesses pending an abatement of the suit, of which they were ignorant, the depositions were allowed to stand (*i*).

Where mistake can be rectified.

Sometimes, when an application is made to suppress depositions on the ground of irregularity, the Court will, if it sees that the ground of the application is a mere slip, endeavour to rectify the mistake, as in the case before referred to, where it was discovered, after the examination of the plaintiff's witnesses, that the title of the cause had been mistaken in the commission, and the Court refused to suppress them, but made an order for a new commission for the cross-examination of the plaintiff's witness and examination of the defendants (*k*). So where a motion was made to suppress depositions taken abroad, because the Commissioners had refused to allow the defendant, who was unprepared with cross-interrogatories (*l*), a reasonable time to prepare them, the Court refused to suppress the depositions, but allowed the defendant to have a new commission, directed to new Commissioners, for the cross-examination of the plaintiff's witnesses, and also for the examination in chief of his own, the defendant being required previously to state upon affidavit the names of the witnesses whom he wishes to cross-examine (*m*).

Course of proceeding.

It is directed by Lord Clarendon's Orders (*n*), 'that no motion shall be made in Court, or by petition, for suppressing of depositions as irregularly taken, until the Six Clerks, not towards the cause, have been first attended with the complaint of the party grieved, and shall have certified the true state of the facts to the Court with their opinion, if the Attornies or Clerks,

(*h*) Hamond v. ——, 1 Dick. 50; ante, p. 488.

(*i*) Sinclair v. James, 1 Dick. 277; ante, p. 539.

(*k*) Robert v. Millechamp, ubi supra.

(*l*) As to the necessity of the interrogatories for cross-examination being delivered before the Commissioners are sworn, vide ante, p. 508.

(*m*) Campbell v. Scougal, 19 Ves. 552. Vide etiam Cholmondeley v. Clinton, 2 Mer. 81.

(*n*) Beames's Ord. 191.

on either side, shall not, for the ease of their clients, agree before them, for which purpose a rule for attendance of the Six Clerks, in such case, shall be entered of course with the Registrar, at the desire of the party complaining.'

For irregularity.

It does not, however, appear, that this order has been recently acted upon, and the practice seems to be for the party complaining to apply at once to the Court, by special motion, stating the facts upon which he relies by affidavit, or upon the certificate of the Commissioners, (the facts of which must, however, be verified by affidavit,) for an order to suppress the depositions; and then if the Court shall, upon hearing the case, entertain any doubt as to the practice, it will either refer it to the Master to certify the practice, or require the Clerks in Court to do so (*o*).

On the ground that witness has disclosed matters which came to his knowledge as Legal Adviser.

It seems that where an application is made to suppress a deposition, upon the ground that the witness has disclosed matters which came to his knowledge in his character of Legal Adviser of the party applying, the course of the Court is, to refer it to the Master to inquire, and state to the Court, which of the matters contained in the depositions came to the witness's knowledge in that character (*p*).

Application may be made before publication.

Although the general time for applying to the Court to suppress depositions is, after publication has passed, because before publication the parties have seldom an opportunity of knowing whether any grounds exist for such an application or not; it is not, however, absolutely necessary to wait till that period of the cause.

If a ground for suppressing depositions can be made to appear, the Court will make the order, although publication has not passed. In *Shaw* v. *Lindsey* (*q*), Lord Eldon said, 'In whatever way the knowledge of the fact reaches the Court, whether from a Commissioner, (and I think it is not incompetent to a Commissioner to disclose it, or even from an *eaves-dropper*,) the Court, having knowledge of the fact, must act upon it (*r*).'

(*o*) Campbell v. Scougal, 19 Ves. 555.

(*p*) Sandford v. Remington, 2 Ves. Jun. 189.

(*q*) 15 Ves. 381.

(*r*) Vide etiam Ferry v. Fisher, cited ibid. 382.

For irregularity.

In that case, the deposition had been taken from a witness who had brought the same ready prepared. In *Spence* v. *Allen* (*s*), depositions appear to have been suppressed before publication, because the interrogatory on which they were taken was leading.

It appears that, in an anonymous case in Ambler, which has been before referred to (*t*), in which the Court made an order to suppress a deposition, because the whole had been written down by the Attorney, before it was taken, in the exact form, the motion was made before publication was passed on the certificate of the Commissioners before whom the examination took place, stating the facts (*u*).

Method of suppressing.

When the order for suppressing depositions has been made, it should be annexed to the depositions; and the Clerks in Court, for all parties, should take care that, according to ancient practice, the suppressed depositions be inscribed—' *Suppressed by order, date,*' &c. setting their signatures thereto (*x*).

Re-examination of witnesses after suppressing their depositions.

In general, where the Court makes an order to suppress depositions on the ground of irregularity, it will, when the irregularity has been unintentional, permit a re-examination of the same witnesses, even though publication has passed (*y*). If, however, publication has not passed, and the commission under which the witnesses were originally examined has not been returned, the re-examination may be before the same Commissioners (*z*). And where a new commission is required, such commission will be directed to the Commissioners named in the original commission (*a*).

The re-examination must, however, in all cases, be upon the same interrogatories (*b*), unless the suppressal has been on account of the interrogatories being leading, in which case, it must be upon a new set of interrogatories, to be settled by the Master (*c*).

(*s*) Prec. in Chanc. 493.
(*t*) Ante, p. 483.
(*u*) Vide Mr Blunt's edit. of Ambler, p. 252, n. 4.
(*x*) 1 Turn. & Ven. 237.
(*y*) Healy v. Jagger, 3 Sim. 494.
(*z*) Shaw v. Lindsey, 15 Ves. 380.
(*a*) Vide the order in *Vaughan* v. *Worrall*, 2 Swanst. 395.
(*b*) Perry v. Silvester, Jac 83.
(*c*) Spence v. Allen, Prec. in Chan. 493; 1 Eq. Ca. Ab. 232; Lord Arundel v. Pitt, Amb. 585.

Re-examination of witnesses.

Must be upon the same interrogatories.

When the same witnesses are to be re-examined upon the same interrogatories, it must form part of the order that they may be cross-examined upon the same cross-interrogatories; and in *Perry* v. *Silvester* (*d*), where depositions were suppressed on the ground of irregularity, the Court ordered that the plaintiff should be at liberty to exhibit the same interrogatories, for the examination of the same witnesses for himself, and the same interrogatories for the cross-examination of the same witnesses for the defendant, as those upon which the several witnesses had been examined and cross-examined by the plaintiff; and it was held to be necessary that all the witnesses who had been examined and cross-examined before, and whose depositions had been suppressed, should be both examined and cross-examined again.

In *Cholmondeley* v. *Clinton* (*e*), where an application was made, on behalf of some of the defendants, to suppress the depositions of certain defendants, which had been taken on the part of the plaintiff, on the ground that no notice of their examination had been served upon the Clerks in Court of the defendants making the application, upon its being shewn that the omission to give the notice arose from a mistake of the plaintiff's Solicitor, who had given, at the Examiner's Office, the name of the Clerk in Court for other defendants, as that of the Clerk in Court for all the defendants, Lord Eldon gave the defendants the option of either permitting the plaintiff to re-examine the same witnesses, or of allowing the depositions to stand, with liberty for them to cross-examine those witnesses and to examine others.

—but will not be allowed unless in cases of mistake.

It seems, however, from what fell from the Court in the above case, that the Court will not order a re-examination of witnesses in a case of this nature, unless it is satisfied that the irregularity or mistake which forms the ground for suppressing the deposition, was a mere slip and was perfectly unintentional (*f*).

Effect of suppressing depositions.

Although the general rule is, that, after depositions have been suppressed, they can never be used in the cause, Lord

(*d*) Jac. 83.
(*e*) 2 Mer. 81.
(*f*) Healey v. Jagger, 3 Sim. 494.

Effect of suppressing depositions.



Eldon is reported to have said, in *Shaw* v. *Lindsey* (g), 'Though the Court does give this sort of direction, (*viz.* to suppress the depositions,) if it should happen that the witness could not be examined again, the objection does not go the length of preventing the Court's directing, hereafter, that the deposition may be opened, if necessity should require that the rule may be dispensed with.'

Depositions suppressed as to one party but not as to another, unless party to the order.

It seems, also, that the rule must be further qualified by limiting it to prevent the depositions being read against the party moving to suppress them, only, unless all the other parties to the cause have been served with notice of the motion. Thus, where an order was made upon the application of one defendant, without notice to the other, for the suppression of the plaintiff's depositions, (on the ground that they had been taken before replication,) with liberty to the plaintiff to re-examine his witnesses upon the interrogatories already filed, and the other defendants, at the hearing, objected to the new depositions, because the only depositions to which they were parties, were those which had been suppressed by the order; the Master of the Rolls, (Sir John Leach,) allowed the objection, and adjourned the cause, in order that the plaintiffs might apply to the Court to have the order varied, by converting it into an order to suppress the deposition as to the defendant who had obtained the order only (h).

SECT. IX.

Re-Examination of Witnesses.

In what cases permitted.

THE Court is always desirous that the examination of witnesses should be completed, as much as possible, *uno actu*, and that, whenever it can be accomplished, no opportunity should be afforded, after a witness has once signed his deposition (a),

(g) 15 Ves. 381. Vide etiam Debrox v. ———, cited in Copeland v. Stanton, 1 P. Wms. 415.

(h) Healey v Jagger, 3 Sim. 494.

(a) Beames's Ord. 74.

and 'turned his back upon the Examiner'(*b*), of tampering with him, and inducing him to retract or contradict or explain away what he has stated in his first examination upon a second; but, notwithstanding this unwillingness, to allow a second examination of the same witness, there are cases in which, if justice requires that a second examination of the same witnesses should take place, an order will be made to permit it.

In what cases.

Thus, as we have seen, where the whole depositions of the witnesses in a cause are suppressed, on account of some irregularity in the conduct of the cause, or in the examination of the witnesses, the Court will, when it is satisfied that the irregularity has been accidental and unintentional, direct the witnesses to be re-examined and cross-examined upon the original interrogatories (*c*).

When depositions have been suppressed for irregularity,

The cases, however, in which the Court will permit the re-examination of the same witnesses after publication, are not confined to those in which the original depositions have been suppressed for irregularity; it has, as we have seen, permitted it to be done in a special case, where the depositions had been suppressed, because the interrogatories upon which they were taken were leading (*d*).

—or because interrogatories were leading,

But, even where the original depositions have not been suppressed, the Court has frequently made an order, after publication, for the re-examination of witnesses, for the purpose of proving some fact which has been omitted to be proved upon the original deposition. This is frequently done upon inquiries in the Master's Office, under decrees (*e*); and even before the cause has been heard, the Court will entertain applications for the purpose of allowing fresh interrogatories to be administered to witnesses who have been already examined in the cause. Thus, in *Cox* v. *Allingham* (*f*), liberty was given to the plaintiff, upon petition, to exhibit an interrogatory before the Examiner, for the examination of his Solicitor, (who had

—or where some important fact has been omitted in the original depositions.

(*b*) Lord Abergavenny v. Powell, 1 Mer. 130.

(*c*) Ante, p. 582.

(*d*) Ante, p. 577. Vide Spence v Allen, Prec. in Chan. 495; 1 Eq. Ca Ab 232; Lord Arundel v. Pitt, Amb. 585.

(*e*) Vide post — Proceedings in Master's Office.

(*f*) Jac. 337.

In what cases.

been before examined,) as to the loss of a deed which had been omitted to be proved by mistake.

So also in a case in Ireland, before Sir A. Hart, L. C., where a witness had mistaken his own age, upon a motion, after publication, for liberty to re-examine him, his Lordship made an order that he should attend the Examiner, and that the Examiner should certify whether the attention of the witness was sufficiently called to the point of age (g). So in a recent case, in the Exchequer, before Lord Lyndhurst, L. C. B., where it was discovered, after publication, that a witness had omitted to answer some parts of the interrogatories exhibited for his examination, leave was given to re-examine him before the Examiner (h). And in *Bridge* v. *Bridge* (i), where the Examiner had omitted to take down the deposition of a witness, on behalf of the plaintiff, to part of an interrogatory, the Vice-Chancellor, Sir L. Shadwell, made an order that the plaintiff should be at liberty to re-examine the witness to the part of the interrogatory mentioned, and that the defendant should have liberty to cross-examine him.

On the application of the witness himself.

In a case before Lord Erskine (k), an order was made, on the application of the witness himself, after publication, for his re-examination as to a point, upon which it appeared, by his affidavit, he had made a mistake. The order, however, was confined to permit his re-examination as to that particular point only, and it directed that the other side should have an opportunity of cross-examining him.

On application at the hearing.

It is to be remarked, that the Court will not only entertain an application for this purpose, after publication has taken place in the cause, but will even at the hearing, where the defect in the evidence of a particular witness has not been discovered before, permit the cause to stand over, to enable the party to make an application to the Court for permission to re-examine the witness; thus, in *Cox* v. *Allingham* (l), where the plaintiff was prevented, by the decision of the Court, from reading a document which had been stated in the Bill, and

(g) Byrne v. Frere, 1 Moll. 396.
(h) Potts v. Curtis, Younge, 343.
(i) 6 Sim. 352.
(k) Kirk v. Kirk, 13 Ves. 286.
(l) Jac. 337.

admitted by the answer, because the admission was coupled with a reference to the document itself, the Court allowed the case to stand over, in order to afford the plaintiff an opportunity of making an application to the Court, for leave to examine his Solicitor, who had been before examined, as to the loss of the document.

In what cases.

Sometimes, in cases of this nature, the Court, instead of having the witness re-examined, will, if the mistake involves only a verbal alteration, permit the original deposition to be amended. Thus, in *Rowley* v. *Ridley*(n), the deposition of a witness was ordered to be amended by the alteration of a date, it being clear, from the evidence, that the insertion of the date in the deposition was the effect of a mistake, though it did not appear, whether the mistake originated with the Commissioners or their Clerk, or with the witness himself. A similar order was made, under like circumstances, in *Griells* v. *Gansell*(o).

Amendment of depositions, in what cases permitted.

It is, however, to be observed, that, before the Court makes an order, either for the re-examination of a witness, or for amending a deposition after publication, it will examine very strictly into the circumstances of the case; and if, upon such examination, it is not satisfied that the error has been wholly accidental, or the effect of mistake or omission, either on the part of the witness or of the Examiner, it will refuse the application(p). And, in general, before making an order for the amending of the deposition, it will, unless the case is very clear, examine both the witness and the Examiner(q).

In what cases the Court will order the attendance of the witness and Examiner.

In all the cases where a correction has been permitted in the deposition itself, a direction that the witness should reswear his depositions after the alteration, has formed part of the order.

Deposition must be re-sworn.

It was stated by Lord Hardwicke, in *Bishop* v. *Church*(r), that the Court had sometimes directed a witness to attend per-

Re-examination by the Court itself.

(n) 1 Cox, 281; 2 Dick. 677, S. C

(o) 2 P. Wms. 646.

(p) Ingram v. Mitchell, 5 Ves. 299.

(q) Ibid. Griells v. Gansell, 2 P. Wms. 646; Darling v. Staniford, 1 Dick. 358; Penderel v. Penderel, Kel 25.

(r) 2 Ves. 100.

In what cases.

sonally when it had a doubt; but in that case the witness, having spoken so generally in his depositions as to leave a doubt in his mind upon a particular point, he refused to proceed in the cause till the witness had been examined upon interrogatories before the Master.

Witness disqualified from interest, afterwards becoming qualified by release, not re-examined.

It may be observed here, that where a witness has turned out to have been disqualified, by reason of interest, from giving evidence at the time of his examination, but afterwards becomes disinterested, the Court will not permit such witness to be re-examined; and, therefore, an application to obtain leave, after commission executed, to exhibit new interrogatories to prove the execution of releases by the former witnesses, and for re-examining them on the former interrogatories, was refused (s).

Secus where the omission to release was accidental.

It seems, however, that if it can be clearly made out, to the satisfaction of the Court, that the omission to execute a release before the original examination, originated in mistake, it will relax the rule, and permit a re-examination of the witness. Thus, in *Milward* v. *Atkins* (t), where the evidence of a bankrupt, who had been examined on the part of the plaintiff, upon an inquiry before a Master, was objected to, on the ground of his being interested, but he afterwards gave a release to his assignees, which was stated to have been previously omitted by mistake; the Vice-Chancellor, on motion, gave leave to re-examine the bankrupt on the same interrogatories as those on which he had been before examined, and to examine other witnesses to prove his certificate and release (u).

Order not in general made before publication.

It is to be noticed, that an order to re-examine a witness, for the purpose of supplying a defect in his former examination, will not, in general, be made before publication has passed in the cause; the reason of which is the difficulty the Court, without seeing the depositions, would have in coming to a correct conclusion as to the propriety of granting or refusing the application.

Thus, in *Lord Abergavenny* v. *Powell* (x), a motion was made

(s) Vaughan v. Worrall, 2 Swanst. 395, Callow v. Mince, Prec. in Chan. 234.

(t) Jac. 339, note (m.)

(u) A motion was made before Lord Eldon to discharge this order was refused. Jac. 339. Vide etiam Sandford v. Paul, 2 Dick. 750; 3 Bro. Ch. Ca. 370, 1 Ves. J. 398.

(x) 1 Mer. 131.

that a witness, who had been examined on the part of the plaintiff, might be permitted to go before the Commissioners, (who were still sitting,) with liberty to explain and correct his former evidence. It appeared, by the affidavit filed in support of the motion, that the witness was very infirm, nearly eighty years old, and had, a short time previously to his examination, met with an accident, in consequence of which he was fearful that he had misunderstood the purport of some of the questions asked him, and had returned incorrect answers; also, that he did not state a circumstance which had been since brought to his recollection, which he understood might be material in explaining the matter in dispute between the parties; but Lord Eldon refused the application, observing, that he was unable to determine whether the evidence intended to be added was explanatory of the former, or in itself new evidence.

After publication.

So where a witness, after having been examined on the part of the plaintiff, saw a written paper in the possession of the defendant, which was at variance with his testimony, and an application was thereupon made to the Court, before publication, for leave to re-examine him in order to correct his former evidence; the application was not granted (*y*). In a recent case, also, a similar motion was made before Lord Cottenham, and refused; but his Lordship having suggested, that the more regular course would have been to make the motion after publication, because then the Court, having seen the depositions, would know exactly what had been deposed, and could have judged what ought to be done, and said, that if the case should be brought before him in that manner, he might perhaps relieve the plaintiff from the difficulty in which he was placed; the motion was renewed after publication had passed; when his Lordship made an order that the plaintiff should be at liberty to re-examine the witnesses to the same interrogatory, the defendants having also liberty to cross-examine them, and the plaintiff paying the costs of the application (*z*).

(*y*) Bott v. Birch, 5 Mad. 66. Vide etiam Asbee v. Shipley, ib. 467; Randal v. Richford, 1 Ch. Cas. 25. Sed vide contra Kirk v. Kirk, 13 Ves. 280.

(*z*) Stanney v. Walmsley, 1 M. & Craig, 361.

Before publication, permitted in Examiner's office.

The reader is reminded here, that it has been before stated, that where the examination of a witness is before an Examiner, either party may, up to the period of publication, exhibit new interrogatories for the further examination of the same or of other witnesses there, without an order to warrant it; but that when a commission is taken out, the practice is different (*a*). It is, however, to be here observed, that power of exhibiting additional interrogatories for the further examination of a witness already examined before the Examiner is confined to the period of a witness being under examination. If the examination of the witness has been closed, and he has perfected and signed his deposition, (although he may be permitted to perfect his deposition in some circumstances of time or the like, or by correcting a sum upon view of any deed, book, or writing, to be shewn to the Examiner (*b*),) he cannot be again examined on behalf of the party producing him without an order of the Court; and it seems that such order cannot be obtained, unless upon affidavit that the witness, if he has been cross-examined, has not communicated the effect of his cross-examination to the party examining in chief (*c*). Nor will such an order be made, at least before publication, for the purpose of permitting a witness to alter or explain what he has stated upon his first examination.

But not after witness has concluded his examination;

—unless by order,

—upon affidavit that he has not communicated the effect of his cross-examination;

But although a witness, after he has closed his examination, cannot be re-examined, on behalf of the party producing him, without an order, he may, if he has been examined before the Examiner, be examined again by the adverse party without an order (*d*). He is, in fact, in such case, a new witness for the other party proposing to re-examine him, and may not only be examined by such party, but may be cross-examined by the party originally producing him. The same rule will also apply to examinations under a commission, where a witness who has been examined by one party may afterwards be examined by the other party, in chief, as his witness, without an

—but he may be examined by the opposite party;

—either before the Examiner,

—or before Commissioners.

(*a*) Ante, p. 472. Vide etiam Andrews v. Brown, 1 E. Ca. Ab. 233.

(*b*) Ante, p. 481.

(*c*) Cockerell v. Cholmeley, 3 Sim. 313.

(*d*) Vaughan v. Worrall, 2 Mad. 322.

order, provided such examination be upon interrogatories which have been produced before the Commissioners were sworn. When it is necessary to examine him upon fresh interrogatories, an order to that effect must, as we have seen, be first obtained (*f*). Thus, where a motion was made on the part of the defendant, that he might be at liberty to exhibit fresh interrogatories for the examination of the plaintiff's witnesses in the suit, on the ground that, after the witnesses had been examined, it was discovered that they were interested, Sir Thomas Plumer, V. C., made the order (*g*), which was afterwards confirmed on appeal (*h*).

Before publication.

Unless new interrogatories are necessary.

It is to be observed, also, that, in the above case, a new commission was necessary for the purpose of taking the examination of the witnesses to the interrogatory. But even if no new commission had been required, it would have been necessary to have obtained an order for the exhibition of the interrogatory before the Examiner; for, as we have seen before, the rule of the Court is, that if a witness has been examined by Commissioners in the country, he cannot be examined again before the Examiner, without a special order (*i*). It may be noticed in this place, that, in a case before Lord Cowper (*k*), this rule appears to have been departed from; but it was in consequence of the plaintiff having practised a trick upon the defendant, who had procured witnesses to attend the execution of a commission for the purpose of proving a will, but, not having the will at the commission, he declined to examine them. The plaintiff, however, examined them as to several matters, and the defendant afterwards examined them in the office, without leave of the Court; and, upon a motion being made, on the part of the plaintiff, to suppress the depositions taken on the part of the defendant, for irregularity, the Lord Chancellor refused it, because of the inconvenience which would result from the precedent which his granting it would establish, viz., 'that one party might trick the other out of his

Witness examined before Commissioner cannot be examined before Examiner without order;

—unless where a surprise has been practised.

(*f*) Ante, p. 473.

(*g*) Vaughan v. Worrall, ubi supra.

(*h*) 2 Swanst. 395.

(*i*) Vide ante, p. 474.

(*k*) Pearson v. Rowland, 2 Swanst. 266 (n.)

Before publication.

evidence by asking his most material witnesses two or three immaterial questions, when he finds him not fully prepared to examine them, and then telling him, you must examine them now or never.'

Order for re-examination.

It is to be mentioned here, that where the Court makes an order for permitting the re-examination of witnesses, it is always coupled with a direction that the other side shall have liberty to cross-examine them (*l*), and that the proceedings upon such re-examination are subject to the same rules as those upon ordinary examination. In *Bridge* v. *Bridge* (*m*), however, Sir L. Shadwell, V. C., upon making an order for re-examination of a witness to part of an interrogatory, (his deposition as to which the Examiner had omitted to take down,) made it part of the order, '*that publication should pass immediately after the examination or cross-examination (if any) should be concluded, and that the cause should be adjourned, with liberty to the plaintiff to apply to have it restored to the paper when publication should have passed.*'

Sect. X.

Examination of Witnesses after Publication.

Must be by special order;

After the depositions of witnesses have been published and read by the parties, a new witness cannot be examined without an order of the Court, which will not be granted unless warranted by special circumstances (*a*), except for the purpose of proving an exhibit *vivâ voce* at the hearing, in which case, as we have seen, an order for the examination of the witness may be obtained on motion or petition of course (*b*).

—unless it is merely to prove exhibit *vivâ voce*.

Not granted without difficulty.

An order for the examination of a fresh witness after publication, except it be for the purpose of discrediting a witness

(*l*) Vide order in Cox v. Allingham, Jac. 345; Stanney v. Walmsley, 1 M. & Craig, 361.

(*m*) 6 Sim. 352.

(*a*) Willan v. Willan, 19 Ves. 590-592.

(*b*) Ante, p. 441.

already examined, is not obtained without great difficulty (*c*). Cases, however, do frequently occur, in which the Court will allow the examination of witnesses after the depositions have been seen; and even at the hearing of the cause, leave has been given to the parties to examine witnesses to facts which have been omitted to be proved in the ordinary course. This, as we have seen, has been frequently done in the case of wills disposing of real estates (*d*); but the practice is not confined to those cases, and other cases have already been mentioned in which the Court has permitted such examinations as to different points, either by order made at the hearing, or upon petition or motion, supported by proper affidavits (*e*). In addition to which it may be stated, that an order for this purpose may be obtained, even where the same point has been examined to before. Thus, in the Court of Exchequer, an order was made by Sir W. Alexander, L. C. B., after publication and before hearing, to examine two additional witnesses, (one only having been examined,) to prove the execution of a will (*f*); and so in a recent case, where witnesses who had been examined to prove the defendant's handwriting to a receipt for stock, had said they did not believe it to be his handwriting; the Vice-Chancellor, considering such deposition to be rather a testification of ignorance than a denial of the fact, granted the motion on payment of costs (*g*).

In what cases granted.

In *Newland* v. *Hersman* (*h*), an order was made for the examination of witnesses abroad, upon new matter stated at the hearing, and not in issue before, upon terms of not delaying an action directed to be tried at law; and in *Gage* v. *Hunter* (*i*), leave was given, after publication, to examine a witness as to a particular fact *vivâ voce*, the defendant being at liberty to cross-examine (*k*).

It is to be observed, that, in general, if leave is given to

(*c*) Willan v. Willan, ubi supra.

(*d*) Ante, p. 416.

(*e*) Ante, p. 417; Clarke v. Jennings, 1 Anst. 173; Gage v. Hunter, 1 Dick. 49.

(*f*) Coley v. Coley, 2 Y. & J. 44.

(*g*) Greenwood v. Parsons, 2 Sim. 229.

(*h*) 2 Cha. Ca. 74.

(*i*) 1 Dick. 49.

(*k*) Vide Holles v. Carr, 3 Swanst. 638, where a similar order appears to have been made upon consent.

In what cases.

examine a witness after publication and before hearing, a Master is sometimes ordered to settle the interrogatories, that they may be confined to such points only as were omitted before and as are now ordered to be examined unto (*k*). This, however, is not always done; and when the object is merely to prove an exhibit, and the interrogatory was before filed, it is unnecessary.

Upon reference to the Master.

Though, by the Orders of the Court, the parties are to make their proof before publication and hearing of the cause, yet, after hearing, if there be a reference to the Master for stating an account or such like matter, and he shall find any particular point or circumstance needful to ground his report upon, which were not fully proved, nor could be properly examined to before the Master, he may direct the parties to draw interrogatories to such points or circumstances only, and the witnesses are usually examined before the Master upon such interrogatories, if the witness be or reside within *twenty* miles of London, but, if further off, and the parties desire it, he may, by certificate, direct a commission into the country, which is to be made out by the plaintiff's or defendant's Clerk in Court that desire such commission (*l*).

To discredit another witness,

The most usual cases in which witnesses are required to be examined after publication, are those, in which their testimony is required for the purpose of shewing that a witness already examined is unworthy of credit (*ll*). An examination for this purpose, is not, however, a matter of course, it must have the sanction of an order, the leading step towards obtaining which, is the preparing or filing of objections, or 'articles' in the Examiner's Office, (if the depositions impeached be taken in town,) or in the Six-Clerks' Office, (where the depositions have been taken by commission) (*m*).

—not granted, unless upon articles previously filed.

These articles may be in the following form, viz.:—

(*k*) 1 Harr. (Ed. Newl) 274.

(*l*) Ibid.

(*ll*) Although the usual time for examining as to the credit of a witness, is after publication, it seems, that it may be done before, provided an order for that purpose be obtained. Mill v. Mill, 12 Ves. 406.

(*m*) Hind. 374.

To discredit a former witness.

Form of articles.

Articles exhibited by A. B., complainant in a certain cause, now depending and at issue in the High Court of Chancery, wherein the said A. B. is plaintiff, and C. D. defendant; to discredit the testimony of E. F., G. H., and J. K., three witnesses examined [before Thomas Hall Plumer Esquire, ***one of the Examiners of the Court*** (n),] ***on the part and behalf of the said defendant.***

1st. ***The said A. B. doth charge and allege, that the said E. F. hath, since his examination in the said cause, owned and acknowledged that he is to receive or be paid, and also, that he doth expect, a considerable reward, gratuity, recompence, or allowance, from the said defendant, in case the said defendant recovers in the said cause, or the said cause be determined in his favour, and that the said E. F. is to gain or lose by the event of the said cause.***

2nd. ***The said A. B. doth charge and allege, that the said G. H. and J. K. are persons of bad morals, and of evil fame and character, and that they are generally reputed and esteemed so to be; and that the said G. H. and J. K., are persons who have no regard for the nature and consequences of an oath; and that they are persons whose testimony is not to be credited or believed*** (o).

Use of articles

The exhibition of these articles, is rendered necessary by one of Lord *Clarendon's* Orders (p), which directs, that the Examiner shall not examine any witnesses to invalidate the credit of other witnesses, but by *special* order of the Court, which is sparingly to be granted, *and upon exceptions first put into writing, and filed with the Examiner without fee,* and notice thereof given to the adverse party or his clerk, together with a true copy of the said exceptions, at the charge of the party so examining.'

To give notice to the other party, of the ground of objection.

The object for which these articles are required, is to give notice to the party whose witnesses are to be objected to, of the ground of the objection, in order that he may be prepared to

(n) If the witnesses have been examined by commission, the following words are to be substituted, for those within brackets: '*by virtue of a commission, issued out of the said Court to X. Y. and others, directed for the examination of witnesses in the said cause, upon certain interrogatories exhibited before them, for that purpose, and which said witnesses were examined in the said cause.* Hind. 375.

(o) Hind. 376.

(p) Beames's Ord. 187.

To discredit a former witness. meet it. Without some notice of this description, it would be impossible for the other party to cross-examine the witnesses to be adduced, for the purpose of discrediting the character of his witness; for as the rule of the Court is, that you cannot examine to any points not put in issue by the pleadings, and as the character of a witness could not by that means be put in issue, it would be impossible that the party should know, that the witnesses examined by his adversary, were for the purpose of discrediting his own. For this reason, the Court not only requires notice to be given of an intention to discredit a witness, in the form of articles as above stated, but it considers all examinations, as to the character of witnesses, without the previous exhibition of such articles, as impertinent, and will order them and the interrogatories upon which they are taken, to be suppressed (*q*).

All examinations as to credit without articles, impertinent.

Course of proceeding upon articles.

Order for leave to examine witnesses,

The articles having been filed, a certificate thereof must be procured from the Examiner, or from the Six Clerk with whom they are filed, and an application must be made to the Court, grounded upon the certificate, for leave to the party applying, to examine witnesses thereon, and if necessary for a commission, to take their depositions in the country (*r*).

—usually granted as of course;

It is to be observed, that although by Lord Clarendon's Order, above referred to (*s*), an order for leave to examine witnesses to credit, is termed a *special* order, it is usually granted as a matter of course (*t*), and may be obtained either by motion, or by petition at the Rolls, without affidavit, upon the certificate of articles being filed (*u*). It seems, however, that if made by motion, it should be upon notice (*x*); and that if the application is made after considerable delay, and the hearing of the cause will thereby be deferred, the Court will refuse the order, or qualify it, by directing that it shall not delay the hearing of the cause (*y*). There is, however, no precise time, within which the application must be made (*z*).

—but motion for, must be special.

(*q*) Mill v. Mill, 12 Ves. 406.
(*r*) Hind. 377.
(*s*) Beames's Ord. 187.
(*t*) Russell v. Atkinson, 2 Dick. 532.
(*u*) Hind. 377; Watmore v. Dickson, 2 V. & B. 267.
(*x*) Ibid.
(*y*) White v. Fussell, 19 Ves. 127.
(*z*) Piggott v. Croxhall, 1 S. & S. 407.

Where a commission is required, it will in general be directed to the same Commissioners as were named in the former commission (*a*); but a commission will not be directed for the purpose of examining witnesses abroad, for which purpose, Ireland is considered as a foreign part, unless in case of great emergency; and where it is sworn, that no person in England, can prove any thing as to the witness's credit (*b*). If a party, who has obtained a commission to examine a witness to credit delays the execution of it till after the decree, he will be made to pay the costs (*c*). The method of proceeding under an order of this nature, whether before the Examiner or under a commission, is precisely similar to that pointed out in ordinary cases.

To discredit a former witness.

Where commission is required.

Not granted abroad;

—nor to *Ireland*.

Must be executed before hearing.

The order usually directs, that the party applying be at liberty to examine witnesses, '*as to credit and as to such particular facts only as are not material to what is in issue in the cause* (*cc*);' and under it the party is at liberty to examine witnesses, not only to the general character of the witness whose credit is impeached, but also for the purpose of contradicting particular facts sworn to by the witness, provided such facts are not material to the issue in the cause, as in *Purcell* v. *M'Namara* (*d*), where the matter to be examined to was, whether the witness had not been a woollen-draper and insolvent, which, upon his cross-examination, he had denied; or in *Chivers* v. *Bax* (*e*), where the articles charged, that though the witness, in her deposition for the plaintiff, had deposed that she lived with him as his milk-maid in 1775, she did not live with him in that or any other capacity till 1786, and that she had confessed to that effect, and that she had been prevailed upon so to depose at the instigation of the plaintiff's tithing man, who was another witness for the plaintiff, and for a reward. In *Ambrosio* v. *Francia* (*f*), the articles charged that one of the witnesses who had been exa-

Nature of examination permitted.

(*a*) Wood v. Hammerton, 9 Ves. 145.

(*b*) Callaghan v. Rochfort, 3 Atk. 613.

(*c*) White v. Fussell, 1 V. & B. 151.

(*cc*) Purcell v. M'Namara, 8 Ves. 324; Wood v. Hammerton, 9 Ves. 145; Piggott v. Croxhall, 1 S. & S. 467.

(*d*) Ubi supra.

(*e*) Scacc.; cited 8 Ves. 324.

(*f*) 5th of August, 1746; cited ibid.

To discredit a former witness.

mined for a defendant, to nine out of seventeen interrogatories, by the description of Mary White, widow, was the wife of the defendant, and known to be such at the time of the examination, suggesting that if she was not his wife, she lived with him, and an improper intimacy subsisted between them, and the order was that the plaintiff should be at liberty to examine to that fact, and also to the competence and credit of the witness.

It seems, also, that witnesses may be examined to discredit other witnesses, by proving that previously to their examination, they had made declarations contrary to their depositions (*g*).

Where to particular facts, it must be confined to facts not in issue.

But, although the order permits the examination of witnesses to particular facts as well as to general credit for the purpose of contradicting a witness previously examined, such facts must be strictly confined to those *not in issue in the cause* (*h*); and you can only, in examining as to the credit of the witness, put general questions, as 'whether you would believe the witness upon his oath (*i*).' It is not competent, even at law, to ask the ground of that opinion, but only the general question is permitted (*k*). The regular mode of examining into general character, is to inquire of the witnesses whether they have the means of knowing the former witness's general character, and whether upon such knowledge they would believe him upon his oath (*l*).

Articles never allowed as to competency.

It is to be noticed, that although articles may be exhibited as to the *credit* of witnesses after publication, they are never allowed as to their *competency*, because it is said this might have been examined to and inquired into upon the examination (*m*), and it is for this purpose that a notice of the witness's name and place of abode is left with the Clerk in Court of the opposite party before examination (*n*), and that, under the old practice, the witness himself was produced (*o*).

(*g*) Piggott v. Croxhall, 1 S. & S. 467.

(*h*) Anon. 3 V. & B. 94.

(*i*) Ibid.

(*k*) Carlos v. Brook, 10 Ves. 49, 50.

(*l*) Phil. & Amos. 925.

(*m*) Callaghan v. Rochfort, Atk. 643.

(*n*) Ante, p. 451.

(*o*) Hind. 375.

As to competency of a former witness.

It was formerly the rule at law, that an objection to the competency of a witness ought to be made on the *voir dire*, and that, if made after the examination in chief, it would not have the effect of excluding the witness; but the strictness of the rule on this subject has been relaxed; and now, if it is discovered during any part of the witness's examination, or even after his cross-examination, that the witness is interested, the objection may be taken and his evidence may be struck out (*p*).

But examination must be at the original examination.

According to the statement of the practice of the Court of Chancery, in Hinde (*q*), the same rule appears to have prevailed in Equity as at Law; it is there said that 'a witness may be examined as to his interest in the event of the suit upon a *voir dire*, at the time of his examination in chief, be it at the Examiner's Office or by commission, and that seems the proper stage wherein such inquiry should be made.' It no where appears, however, what the course of examination upon the *voir dire* in Chancery is, either before the Examiner or Commissioners; but, it seems, from the statement of Lord Eldon, in *Vaughan* v. *Worrall* (*r*), that all the ancient forms of interrogatories included a question whether the witness was or was not interested in the event of the suit, and it is probable that this form of interrogatory was adopted for the purpose of enabling the Examiner or Commissioners to examine a witness as to his competence upon the *voir dire*, and that its discontinuance has been owing to a similar relaxation having taken place in equity, of the rule which required an examination to the interest of a witness to be before the examination in chief commenced, to that which has been stated, above, to have taken place at law (*s*). It certainly is not the present practice to commence each set of interrogatories with questions as to the witnesses' interest in the cause, unless it is suspected that interested witnesses are likely to be examined, in which case it is usual for the other party to exhibit an interrogatory for the purpose of examining such witnesses as to their

(*p*) Phil. & Amos. 148, 884.
(*q*) Hind. p. 375.
(*r*) 2 Swanst. 396.
(*s*) Supra.

As to competency of a former witness.

interest. It is to be observed, however, that as it is not now, as formerly, considered necessary to examine witnesses as to their interest, before their examination as to any other matter is commenced, so it is now considered unimportant in what part of his examination such interrogatories are put to the witness, nor in what order they stand (*t*); therefore, where the examination is in Court, interrogatories of this nature, for the purpose of examining an adversary's witness as to his interest, may be exhibited at any time before publication; where, however, the examination is under a commission, such interrogatories must, as we have seen (*u*), (unless a special order has been obtained for the purpose of authorizing them,) be exhibited before the Commissioners are sworn.

Secus where interest has become known since.

A special order may, however, be obtained upon application, and the Court, upon being satisfied, by affidavit, that the circumstance of the witness being interested was not known to the party applying, till after the examination of the witnesses under the commission had terminated, and the commission had been returned, has given him leave not only to exhibit interrogatories, for the purpose of examining such witnesses as to their interest, but has permitted a new commission, directed to the original Commissioners, to issue, for the purpose of taking their depositions to such interrogatories (*x*). The Court, however, will not, at the same time, direct interrogatories to be exhibited to prove the subsequent execution of releases to such witnesses, or upon the allegation of such releases having been executed to re-examine the same witnesses on the former interrogatories (*y*).

Articles may be exhibited to shew denial of interest untrue.

It is to be remarked, that although, strictly speaking, articles cannot be exhibited as to the incompetency of a witness after publication has passed in the cause, they may be exhibited for the purpose of impeaching the credit of the witness by shewing that his denial of interest is untrue, and, by this means, the competency of the witness may be distinctly brought into question by the exhibition of articles. This was

(*t*) Perigal v. Nicholson, Wightw. 64.

(*u*) Ante, p. 473.

(*x*) Vaughan v. Worrall, 2 Mad. 322; 2 Swanst. 395.

(*y*) Ibid.

As to competency of a former witness.

precisely the effect of the articles in *Ambrosio* v. *Francia* (z), before referred to, where it was charged that one of the witnesses, who had been examined, on the part of a defendant, as *Mary White*, widow, was the wife of the defendant. Whether the effect of this evidence would be to prevent the evidence of the original witness from being read, or only to impeach his credit, does not appear from any reported case; but, according to the present practice of Courts of Law, the party against whom a witness is called may examine him respecting his interest on the *voir dire*, or may call another witness and produce other evidence in support of the objection, when, if the fact of interest is satisfactorily proved by other evidence, the witness will be rejected though he may have ventured to deny it on the *voir dire* (a).

Form of interrogatories.

Interrogatories adapted to the inquiry intended, must be drawn and filed in the same manner as upon examinations in chief, and the witnesses examined thereon, either by commission or at the Examiner's Office. The other party may cross-examine those witnesses, as to their means of knowledge and the grounds of their opinion, or may attack their general character, and, by fresh evidence, support the character of his own witness (b).

Publication, &c.

The rules as to passing publication, &c., are the same, *mutatis mutandis*, as those to be observed in ordinary cases.

Where an objection is established to the *competency* of a witness, his deposition cannot be read; but, where the objection is only to his credit, it must be read and left to the consideration of the Court on the whole evidence of the case (c).

(z) Ante, p. 597.

(a) Phil. & Amos. 149. It is to be observed that, in Lord Hardwicke's time, the rule appears to have been that the statement of a witness who had been examined, as to the fact, on the *voir dire*, and denied that he was interested, could not be contradicted. Ibid., notis, and vide Lord Lovat's case, 9 St. Tr. 647, fo. ed., 10 How. St. Tr. 596.

(b) Ibid.; etiam Hind. 377.

(c) Dixon v. Parker, 2 Ves. 219, 220.

CHAP. XXI.

Of setting down the Cause for Hearing.

Publication having been passed, and the depositions read, the next step is to set the cause down for hearing.

Before what Court.

Formerly, this might be done before either the Lord Chanlor or the Master of the Rolls, according to the discretion of the Solicitor, regulated by the nature and importance of the suit, and the arrear of cases depending before each of them respectively; but, in consequence of a recent regulation (*a*), this discretion must now be exercised before or at the time of filing the original Bill, except in those cases where the Bill was filed before the 20th of May, 1837, and no order disposing of any plea or demurrer, or any special order or order upon merits, shewn by answer or by affidavit, has been made in the cause.

Under New Orders.

Where Bill filed since 20th of May, 1837.

By the Orders above referred to, it is directed, that from and after the 20th of May, 1837, any information or Bill of complaint shall, at the option of the party by or on whose behalf it has been filed, be distinctly marked, at or near the top or upper part thereof, either with the words '*Lord Chancellor,*' or with the words '*Master of the Rolls.*' These words are so to be marked for the purpose of indicating the judge before whom the cause is to be heard, and the Six Clerks and Clerks in Court are not to file any original information or Bill of complaint which shall not be marked in the manner above mentioned (*b*), but in every cause in which the original information or Bill shall be marked with the words '*Lord Chancellor,*' (or with the words '*Master of the Rolls,*' the Six Clerk, to

(*a*) Ord. 1837. (*b*) Ibid. Ord. 1.

Before what Court.

whom it belongs to give a certificate that the cause is ready for hearing, shall, upon being applied to for such certificate see that the same certificate is marked or cause the same to be marked with the words, '*Lord Chancellor*,') or with the words '*Master of the Rolls*,' in conformity with the like words marked in the original information or Bill (*c*), and it is provided, that every cause, in which the certificate of the cause being ready for hearing shall be marked with the words '*Lord Chancellor*,' must be set down to be heard before the Lord Chancellor, and shall not, without the special order of the Lord Chancellor, be set down to be heard before the Master of the Rolls (*d*); and every cause in which the certificate, the same being ready for hearing, shall be marked with the words '*Master of the Rolls*,' shall be set down to be heard before the Master of the Rolls, and shall not, otherwise than for the purpose of rehearing, be set down to be heard before the Lord Chancellor (*e*).

By the plaintiff.

A cause is usually set down for hearing by the plaintiff, and the proper time for setting it down, is *the term following that in which publication is passed*. But no cause can be set down to be heard, unless by consent, in the same term as that wherein publication is passed (*f*), except, upon application to the Court, it shall appear, by affidavit, that it will be to the particular prejudice of any party to wait for publication (*g*); or, where publication has been delayed, 'without prejudice to the plaintiff's right to set the cause down (*h*).' It has, however, been held, that a cause may be entered for hearing, under the 82nd Order of 1831 (*i*), in the vacation ensuing the

(*c*) Ord. 1837, II. Ord. III. points out the manner in which the Court before which causes commenced before the 20th of May, 1837, are to be heard, is to be ascertained.

(*d*) Ord. 1837, VI.

(*e*) Ibid. Ord. X.

(*f*) Beames's Ord. 319.

(*g*) Ibid. 333. Vide etiam Lord v. Genslin, 5 Mad. 83; For. Rom. 152.

(*h*) Ante, p. 569.

(*i*) Under the old practice a cause might be regularly set down without consent in the vacation after the term in which publication passes. Partridge v. Cann, 1 S. & S. 466. So that the recital in the 82nd Order, that, according to the (then) present practice, causes could only be entered for hearing during the time of term, is incorrect.

By the plaintiff.

term in which publication has been passed: although the book of causes in the Registrar's Office, in which it is entered, is entitled the cause-book of that term.

If a plaintiff, after serving an order for a commission to examine witnesses in the country, under the 17th Order of 1831 (*k*); or, under an undertaking to speed the cause entered into by him, on a motion to dismiss his Bill for want of prosecution, pursuant to the 16th Order of 1831 (*l*), omits to set the cause down for hearing, and to serve a subpœna to hear judgment, in the term following that fixed by the 17th Order, for the return of the commisison, his Bill may, upon application, by the defendant, upon notice of motion, be dismissed out of Court with costs, unless the Court shall make special order to the contrary (*m*); and it has been held, that, even though the plaintiff does not sue out a commission under the order which he has served, he must, nevertheless, in order to prevent a dismissal, set down the cause for hearing, within the time limited by the 17th Order: the circumstance of his having sued out and served the order, for the commission, being considered sufficient to bring the case within the operation of the Order (*n*).

It is to be observed that, by the 17th Order of 1831, it is provided that when a commission issues, pursuant to that or the last foregoing Order, (the 16th,) the parties are at liberty to execute the same in term time, and publication is to stand enlarged until the commission be returnable (*o*); *but the plaintiff is at liberty to set the cause down in the meantime without the necessity of inserting such directions in the order for the commission.*

At the request of defendant.

Where the plaintiff does not set down his cause in the term following that in which publication has passed, it may, in cases which do not come within the 17th Order, (and even in cases which do, if the defendant prefers such a course to the one of moving to dismiss the Bill,) be set down *at the request of the*

(*k*) Ante p. 37 .
(*l*) Ante, p. 375
(*m*) Ante, p. 3[illegible]1.
(*n*) Vide ante, p. 564.
(*o*) Ante p 567.

defendant, who, however, is bound to wait for that purpose till the next following term (*p*), unless in injunction cases, in which a defendant is at liberty to apply to set the cause down for hearing in the term after publication (*q*).

At the request of defendant.

It is to be observed that, as a plaintiff is entitled, after the rule to pass publication has expired, to set down his cause to be heard in the subsequent term, any order made at the instance of a defendant to enlarge publication, will only be made with this restrictive clause:—*So as not to prevent the plaintiff from setting down his cause in the meantime* (*r*).

The Six Clerks claim a privilege of setting down a certain number of causes to be heard before the Lord Chancellor or Master of the Rolls, in each term. They usually give notice to their sworn Clerks when they intend to set down causes for the ensuing term, which in Hilary, Trinity, and Michaelmas Terms, is usually the day following the third seal of the sittings after the preceding term; and, in Easter vacation, the day before the first seal preceding Trinity Term (*s*). The Solicitor, being prepared and willing to have his cause set down for hearing, acquaints his Clerk in Court therewith, who applies to the Six Clerk of his division, and leaves with him a short note in writing containing the title of the cause, and the object of the suit, also that a rule to pass publication has been regularly entered and expired (*t*), and, upon this being produced to the Six Clerk, he will set the cause down to be heard either before the Lord Chancellor or Master of the Rolls according to the directions of the Orders of the 7th of May, 1837 (*u*).

Manner of setting down, —by the Six Clerks,

The Six Clerks, however, are limited as to the number of causes they have the privilege of setting down, and, if their number be complete, the cause must be set down by the Registrar; but, previous thereto, a certificate must be obtained by the Clerk in Court, from the Six Clerk, that the pleadings are regularly filed, and that publication hath regularly passed in the cause, as appears by his books, to which

—by the Registrars.

(*p*) 1 Harr. (Ed. Newl.) 392.
(*q*) Ibid.
(*r*) Ibid. 103.
(*s*) Ibid. 103.
(*t*) Ibid.
(*u*) Ant., p. 612.

By the Registrar.



must be added the words '*Lord Chancellor*' or '*Master of the Rolls,*' as the case may be, to indicate the Court in which the cause is to be heard, according to the provisions of the before mentioned order (*x*).

Upon Bill and answer.

Where the plaintiff is inclined to have his cause heard upon Bill and answer, the method of proceeding is the same *mutatis mutandis* (*y*).

Irregularity in setting down.

In setting down causes, care should be taken that no irregularity be incurred, for it seems that, even after a decree, the Court will upon application refer it to the Master to inquire whether the cause was set down regularly or not (*z*).

(*x*) Ord. 1837; ante, p. 602.

(*y*) Hind. 405.

(*z*) Hind. 406; Page v. Page, Mos. 44.

A TREATISE

ON THE

PRACTICE

OF THE

HIGH COURT OF CHANCERY,

WITH SOME

PRACTICAL OBSERVATIONS

ON

The Pleadings in that Court.

BY EDMUND ROBERT DANIELL, F. R. S.
BARRISTER AT LAW.

IN TWO VOLUMES,
VOL. II.—PART II.

LONDON:
W. T. CLARKE,
LAW BOOKSELLER AND PUBLISHER,
PORTUGAL-STREET LINCOLN'S-INN.

1839.

ERRATA.

Page 359, line 21, *dele* 'that.'
361, line 11, *for* 'defendants' *read* plaintiffs.'
374, line 17, *dele* 'within three weeks from the undertaking being given.'

DAVIDSON, PRINTER,
SERLE'S PLACE, CAREY STREET.

CHAP. XXII.

Of the Subpœna to Hear Judgment.

Nature of the process.

The cause being set down before the Lord Chancellor or Master of the Rolls, the next step is to give notice to the adverse party of the day appointed for the hearing. This is done by means of a writ called a *Subpœna to hear Judgment.*

By whom sued out.

The 'subpœna to hear judgment' is generally served by the plaintiff, upon setting down the cause for hearing, but it sometimes happens that a plaintiff, although he sets down the cause, does not, upon further consideration, think fit to serve the defendant with a subpœna to hear judgment; in such case the defendant, if he will have the Bill against him dismissed with costs, must, himself set the cause down to be heard *ad requisitionem defendentis,* though the effect of such a proceeding may be that a decree is made against himself (*a*).

Undertaking to appear at the hearing.

It is sometimes the practice, amongst Solicitors, instead of serving subpœnas to hear judgment, to take each others undertaking to appear at the hearing. This, however, is an unsafe practice; and in cases where it is important to the party that the suit should be disposed of, ought not to be resorted to; because, if the party giving the undertaking fails to appear at the hearing, the party setting down the cause can do nothing, and the cause must be struck out of the paper: whereas, if, after subpœna to hear judgment duly served, default is made by the party served, the other party, if plaintiff, will, upon producing to the Court an affidavit of the service of the subpœna, be permitted to take a decree *nisi* against the defendant making default. And so where a cause has been set down at the request of a defendant, if the plaintiff, having been served with a subpœna to hear judgment, omits to appear when the cause is called on, the defendant will be in a situation to

(*a*) For Rom. 157.

Nature of. have the bill dismissed with costs, upon producing an affidavit of service of the subpœna (*b*).

How sued out. The method of suing out and issuing this writ, is the same as that already pointed out as the method of suing out and issuing the ordinary subpœna *ad respondendum* (*c*); but, previously to suing it out, the Clerk in Court must procure from the Registrar, a note, in writing, of the cause having been set down (*d*). This note, is called *a 'subpœna note,'* and is filed in the Subpœna Office; by an order of the Court (*e*), 'the Registrar or any of his Clerks are not to make any such note before they have a certificate, under the hand of such of the Six Clerks as is Attorney in the cause, that the cause is ready for hearing, who is also, in such note, to set down who is the Attorney for the other side and when the cause began, to the intent that the Registrar may set down both the Attornies' names to every cause set down by him in the book of hearings, that, where cause shall be, his Lordship and the Court may know whom to call upon any occasion that may arise' (*f*). The form of a subpœna to hear judgment is pointed out in the Orders of 1833, and is as follows, viz.—

Form of writ. VICTORIA, &c. *To*——— *Greeting.*

We command you, (and every of you,) that you appear before our Lord High Chancellor, (or "before his honor the Master of the Rolls, or before his honor the Vice-Chancellor (*g*)," as the cause may be set down,) *on the* ——— *day of* ——— *next, or whenever thereafter a certain cause now depending in our High Court of Chancery, wherein* ——— (and others or another,) *are plaintiffs and* ——— (and others or another,) *are defendants, shall come on for hearing; then and there to receive and abide by such judgment and decree, as shall*

(*b*) Ellis v. King, 5 Mad. 21. It seems, however, that in such cases, on an application for that purpose, the Solicitor for the party making default will be made to pay the costs occasioned by his default, (not the costs of the day,) ib. Vide etiam Cook v. Broomhead, 16 Ves. 131.

(*c*) Ant., vol. 1, 560.

(*d*) Hind. 408.

(*e*) Beames's Ord. 46.

(*f*) Vide etiam, ib. 47, 50, 104, 109, 221. The latter part of this order is not now acted upon.

(*g*) Note. This is incorrect, because the only causes heard by the Vice-Chancellor are those set down before the Lord Chancellor, who deputes the Vice-Chancellor to hear them for him. Vide 53 Geo. 3. c. 24.

then or thereafter be made or pronounced, upon pain of judgment being pronounced against you by default.

Form of.

Witness, &c. Devon.

Day of return.

This writ is always made returnable *three days* before the day on which the cause is set down to be heard, which will appear by the Registrar's note, unless the return day happens to be on a Sunday, in which case a day more is allowed (*h*).

—may be out of term.

Formerly a subpœna to hear judgment could only be made returnable in term time, but, by the 82nd of Lord Lyndhurst's Orders (*i*), they may now be made returnable as well out of term as in term. We have seen before, that where a plaintiff requiring a commission to examine witnesses, sues out and obtains an order for such commission within the time limited for that purpose, either by the 17th Order (*k*), or by the undertaking entered into by him, upon motion to dismiss his Bill under the 16th Order (*l*), the commission must be returnable on the first return of the *second term next following*, and the return of the subpœna to hear judgment must be in the *succeeding term* (*m*).

—Indorsement.

Upon the back of the writ, the name or firm and the place of business or residence of the Solicitor or Solicitors issuing the subpœna, must be indorsed; and where such Solicitors shall be agents only, there must be further indorsed thereon, the name or firm and place of business or residence of the principal Solicitor or Solicitors (*n*). And it is to be observed that an affidavit of service of such a subpœna must state the indorsement (*o*).

—may include three names.

By the the 5th Order of 1833, it is provided that this subpœna as well as all others, except a subpœna *duces tecum*, shall contain three names where necessary or required (*p*). In reckoning which the names of husband and wife are counted as one (*q*).

Under the old practice of the Court, it was necessary that subpœnas to hear judgment should be served personally or left at the

(*h*) Hind. 409.
(*i*) Ord. 1831.
(*k*) Ibid.
(*l*) Ibid.
(*m*) Ante, p. 491
(*n*) Ord. 1833 III.
(*o*) Powell v. Martin, 1 Jac. & W. 292; Mogg v. Wall. 3 M. & C. 506
(*p*) Ante, v. 1, p. 559.
(*q*) Ibid.

Service of, — may be upon Clerk in Court,

house of the party with one of the family a certain time before the day fixed for the hearing, it being an ancient rule of the Court, that no decree bindeth any person who was not served with process *ad audiendum judicium*, or did not appear in person in Court (q). Personal service has now, however, been dispensed with, by the 20th of Lord Lyndhurst's Orders (r), which directs that service on the Clerk in Court of any subpœna to hear judgment shall be deemed good service. Under the old practice, where neither the party nor his Clerk in Court could be found, the Court has allowed the subpœna to hear judgment to be served upon the person who acts as the party's solicitor, at the same time directing that a copy of the order should be left with some person in the house which was the defendant's last abode (s).

—in what manner,

Service of this writ is to be effected in the same manner as that in which service of all other writs of subpœna is effected under the 8th Order of 1833 (t); the time of service is regulated by the residence of the party upon whom it is to be served. If he lives in London, or within twenty miles, it should be served *ten days*, exclusive of the day of service, before the day appointed for the attendance. If the party resides above twenty miles from London, the service must be *fourteen days*, exclusive of the day of service, except it be in the short vacation, *i. e.* in the vacation between Easter and Trinity terms, when it need be served only *ten* days before the time appointed (u). By the 82d Order, before referred to, the subpœna *ad audiendum judicium* may be served on any day, as well out of term as in term (x).

—within what time. Where defendant lives within 20 miles of London. —above 20 miles from London.

Where plaintiff has served an order for a commission.

Where, however, the plaintiff requiring a commission to examine witnesses, has served an order for such commission within the time limited for that purpose by the 17th Order (y), or by the undertaking entered into by him upon a motion to dismiss his Bill, pursuant to the 16th Order (z), he must serve his subpœna to hear judgment in sufficient time to allow of its being returnable in the third term next succeeding the ser-

(q) Beames's Ord. 7.
(r) Ord. 1828.
(s) Anon. 2 Ves. 23.
(t) Ante, vol. 1, p. 563.
(u) Hind. 410. Prac. Reg. 410.
(x) Ante, p. 609.
(y) Ord. 1831.
(z) Ibid.

vice of the order for the commission; and it is to be remarked, that when a plaintiff has once brought his case within the operation of the 17th Order, by serving an order for a commission to examine witnesses, his subsequent abandonment of the commission will not relieve him from the necessity of complying with the other requisites of that order (*a*).

Service of.

It is to be recollected, that no subpœna (except for costs,) can be served after the last day of the term or vacation in which it was sued out, and that if any correction shall be required of any error in the name of the parties, such error must be corrected, and the writ resealed, in the manner before pointed out, in the interval which occurs between the suing out and service of the writ (*b*). If, however, an irregularity occurs, either in the writ or in the service of it the appearance of the party in pursuance of it will waive it; and where a defendant, after service of a subpœna to hear judgment, in which the plaintiff's name was mis-spelt, appeared upon a motion to advance the cause, and opposed it, but did not appear at the hearing, whereupon a decree was made by default, Lord Eldon held that the defendant had waived the objection by appearing upon the motion, and not then objecting (*c*).

—not after the Term or Vacation in which sued out.

Irregularity in service cured by appearance.

It may be observed here, that where a cause has been set down by a defendant, he is not obliged to serve any other party with a subpœna to hear judgment than the plaintiff, and that, if there are other defendants, it is the duty of the plaintiff, and not of the defendant setting down the cause, to serve them (*d*).

Where defendant has set down the cause.

When a cause has been once set down, and a subpœna to hear judgment served, a revivor of the suit, after abatement by the death of the plaintiff, will not render the service of a new subpœna, to hear judgment, necessary (*e*). In *Byne* v. *Potter* (*f*), however, where the abatement was occasioned by the death of a sole defendant, the Registrar considered that service of a new subpœna, to hear judgment upon the executor, was necessary, though the Lord Chancellor doubted it, and

New service not necessary after revivor.

(*a*) Ante, p. 382.

(*b*) Ante, v. 1, p. 560.

(*c*) Carvick v. Young, Jac. 521.

(*d*) Clarke v. Dunn, 5 Mad. 474. In such cases, if the plaintiff does not appear, the Bill will be dismissed as to that defendant only.

(*e*) Bray v. Woodman, Mad. & Geld. 72.

(*f*) 5 Ves. 305.

Service of.

appeared to think that the service of the order to revive was sufficient notice to the defendant. But it seems that, where a cause is ordered to stand over for want of parties, with liberty to amend; the mere service of the order to that effect, will not prevent the necessity of serving a new subpœna, to hear judgment (*g*).

Secus after cause ordered to stand over for want of parties.

Service of subpœna embraced in undertaking to set down cause.

In general, whenever a plaintiff undertakes to set down his cause for hearing, it is held, that his undertaking extends to serving a subpœna to hear judgment (*h*); where, however, a plaintiff, who had replied to the answer, was permitted to withdraw his replication, upon his undertaking to set the cause down for hearing upon bill and answer, it was decided, that the service of the order was equivalent to serving a subpœna to hear judgment, and upon the plaintiff's not appearing when the cause was called on, the Bill was dismissed with costs (*i*).

—not necessary where plaintiff has obtained an order to withdraw replication and set down cause upon Bill and answer.

Affidavit of service.

Each party, as well the one served as the party serving the subpœna, will do well, before the day of hearing, to have an affidavit of the service of the writ filed at the proper office, and to be provided with an office copy of it to be made use of in case the opposite party do not appear when the cause is called on. Such affidavit, when filed on behalf of the plaintiff, should be made by the party serving it, and it must distinctly describe the manner of service, and must contain a copy of the writ, as well of *the indorsement upon the writ* as of the body of it, otherwise a decree *nisi*, taken upon the production of such affidavit, will be irregular (*k*). The same rule also applies to affidavits required to be produced by a defendant verifying the service of the subpœna to hear judgment, for the purpose of obtaining a dismissal of the Bill upon the plaintiff's making default at the hearing (*l*).

Form of affidavit.

(*g*) Knowles v. Spence, Mo 225.

(*h*) Ante, p. 375.

(*i*) Rogers v. Goore, 17 Ves. 130. Ante, p. 375.

(*k*) Powell v. Martin, 1 Jac. & W 292; Bigg v. Wall 3 M. & C. 506.

(*l*) Bigg v. Wall, ubi supra. It is to be observed, that the Court will permit an affidavit of service of the subpœna to hear judgment to be made after the cause has been called on; this, however, is not the correct practice, and the Vice Chancellor has intimated his opinion to be, that the parties should always come into Court, prepared with their affidavits of service, and that the costs of such affidavits ought to be allowed in taxation, whether made use of or not.

CHAP. XXIII.

Of Hearing Causes.

The names of all causes entered for hearing, are inserted by the Registrar in two books, one appropriated to each Court, and from those books the Registrar makes out the paper of causes to be heard on each day of hearing.

Daily cause paper;

It appears that, previously to the year 1636, four causes only were usually set down to be heard on each day, (*a*); since that time, the causes set down in the daily paper have been increased to twelve, which is now the number usually put into he paper for hearing.

—number of causes in;

The daily paper of causes for hearing, is always made out by the Registrars, from the list of causes entered in their general books of causes, taken in rotation as they stand (*b*); and a copy of this paper is put up in the Registrars and Six Clerks Offices, in the evening of the day previous to the hearing.

—how made out.

But, although causes are always taken from the Registrar's book, for the purpose of being entered in the paper for hearing, in the order in which they stand, it frequently happens that the Court, upon a proper ground being stated, will order a cause which has been set down for hearing to be taken out of its turn; for the Court holds, that a defendant has no right to object to a cause being heard, at any time, after it has been set down for hearing (*c*). Thus where the plaintiff applied to the Court to have his cause advanced, on the ground that a term of years, which was the subject of dispute, would expire before the case could come on in its regular

Of advancing causes,

—on the ground that the object of the suit will be lost.

(*a*) Beames's Ord. 90. Curs. Canc. 341.

(*b*) From the following passage in North's Life of Lord Keeper Guilford, it appears that formerly a very strict degree of regularity was not observed in the office in making out the cause lists, 'Nothing sat heavier upon his (the Lord Keeper's) spirits than a great arrear of business, when it happened, for he knew well, that from thence sprang up a trade in the Registrar's Office, called "Heraldry," that is, buying and selling precedence in the paper of causes, than which there hath not been a greater abuse in the sight of the sun.' Life of Lord Keeper Guilford, vol. 1, p. 435.

(*c*) Hoyle v. Livesey, 1 Mer. 381.

Of advancing Causes.

Where the subject matter is the whole of plaintiff's maintenance.

Where Bill has been ordered to be taken *pro confesso.*

course, the order was made on the plaintiff's undertaking to give due notice of the advancement to the defendant (*c*); and so where an annuity, claimed by the Bill, was all the subsistence the plaintiff had for herself and nine children, that was held a sufficient ground for having the cause advanced (*d*). And, where a cause has been set down for hearing, for the purpose of obtaining a decree *pro confesso* against the defendant, the Court will order it to stand at the head of the paper (*e*). Formerly the Court would not advance suits for the foreclosure of mortgages (*f*), but, by a recent order, 'Foreclosure causes, when ready for hearing, may be ordered to be advanced for hearing, under the same circumstances and subject to the same rules as other causes may be ordered to be so advanced (*g*).'

Where the cause not likely to take much time.

Sometimes, where a cause involves no question of difficulty, and is not likely to take up much time in argument, or is such, that the subject matter of it would authorize the Court to make a decree as of course, the Court will order it to be heard as a short cause, amongst the short causes, for the hearing of which, days are frequently appointed, both in term and vacation time.

Of setting down causes as short causes.

The usual method, however, of having a cause heard as a short cause is, for the plaintiff to enter it as such, at the time of setting it down for hearing, which he may do, on producing to the Secretary of the Lord Chancellor, or of the Master of the Rolls, a certificate signed by one of the Counsel in the cause, (generally the Counsel who has signed the pleadings,) that the cause is fit to be heard as a short cause. This course, however, can only be resorted to when the other party concurs. If the defendant refuses to concur, in setting the cause down as a short cause, the proper course appears to be, at least where the cause is at the Rolls, for the plaintiff to apply to the Court, by motion, when an order will be made for putting the cause into the paper of short causes, upon the production of the usual certificate signed by Counsel (*h*).

Where defendant refuses to concur.

(*c*) Hoyle v. Livesay, 1 Mer. 381.

(*d*) 2 Mad. Prin. & Prac. 588.

(*e*) Hart v. Ashton, 1 Mad. 175. Barwick v. Ward, 5 Sim. 676; Bolton v. Glasford, ib. 677, notis.

(*f*) Rashleigh v. Dayman, 2 Mad. 147.

(*g*) Ord. 9 May, 1839, IV.

(*h*) Mountford v. Cooper, 1 Keen. 464.

Short Causes: Practice before the Vice-Chancellor.

From what is stated in *Rashleigh* v. *Dayman* (*i*), which has been before referred to, it seems as if this proceeding were in conformity with the established practice of the Court; it is right, however, to mention, that, in a subsequent case before Sir Lancelot Shadwell, V. C. (*k*), his honor refused a similar application, observing, that he could not order a cause to be heard as a short cause, without hearing a previous discussion, as to whether the cause was proper to be heard, which would be attended with great inconvenience, as it might involve a discussion of the question in the cause.

Difference in practice at the Rolls.

In consequence of these decisions, a difference now exists in this respect, in the practice of the two branches of the Court. And in the Rolls Court, the principle acted upon by Lord Langdale, M. R. in *Mountford* v. *Cooper* (*l*), has been carried, by his Lordship, still further in *Hutchinson* v. *Stephens* (*s*), in which his Lordship, *at the instance of the defendant*, advanced as a short cause, one which had been set down by the plaintiff for hearing upon further directions. When the application was made, the plaintiff's Counsel opposed it, but being asked, by the Master of the Rolls, whether he could state, that the cause was not proper to be heard as a short cause, he admitted that he was not prepared to say so, and his Lordship made the order. A motion was afterwards made, before the Lord Chancellor (Lord Cottenham,) to discharge the order, on the ground that it was unprecedented (*n*); but his Lordship refused to interfere, observing that it would be very strange to say, that the plaintiff had such a vested interest in the unavoidable delays of the Court, that he was entitled to prevent the cause coming on, till all the causes which had been set down before it, (and which might be long litigated cases,) had been disposed of. His Lordship further said, 'the only real question would be, whether it would be fair to the other suitors of the Court, to take this cause out of its turn. The plaintiffs are bound to be ready, when the cause is in a proper state to be heard, and it is only an accident, arising from the state of other causes, that it does not come on immediately. *I have never heard it*

Cause advanced at the instance of the defendant.

(*i*) 2 Mad. 147.
(*k*) Ker v. Cusac, 7 Sim. 520.
(*l*) Ubi supra.
(*m*) 1 Keen, 659.
(*n*) Hutchinson v. Stephens, 2 M. & C. 152.

Short causes

doubted, that the Court will exercise its jurisdiction, as to the time when it will hear a cause which is in a state to be heard, the subpœnas to hear judgment being returnable. I see no ground for interference in this case, and I very much doubt whether I could interfere, even if I thought the Master of the Rolls had not exercised a sound discretion in the present instance; such an interference would be very inconvenient, and I think it extremely doubtful, whether it would not be inconsistent with the Act of Parliament, which gives the Master of the Rolls jurisdiction' (*o*).

Cause improperly advanced, struck out,

It is to be noticed, that, if a cause which has been advanced as a short cause, or put into the paper as such, should eventually be found to be one not entitled to be so advanced, it will be ordered to be struck out of the paper. Thus in ***Rashleigh***, v. *Dayman* (*p*), where a suit for a foreclosure, which, according to the practice as it then existed, could not be advanced (*pp*), had been transferred to the paper of short causes, it was ordered to be struck out of that paper; and, where two causes had been set down, on the same day, to be heard as short causes, but occupied in argument a considerable time, the Master of the Rolls, (Sir Thomas Plumer,) directed them to be postponed till after the other short causes, observing that, in such cases, in future, the causes must be restored to their original places (*q*).

—*e. g.* if it be for a foreclosure,

—or likely to occupy considerable time.

Of consent causes.

It sometimes happens, that, after a cause has been set down for hearing, the parties agree amongst themselves as to the decree which shall be taken; in such cases, as well as in the case of short causes, the Court will, upon application by Counsel, order the cause to be advanced; but the most usual way of getting cases of this nature disposed of is, to set the cause down at once, as a *consent cause*, which may be done by the Secretary, either of the Lord Chancellor, or of the Master of the Rolls, upon the production of the usual certificate of the pleadings having been filed, &c. (*r*). For the disposal of matters so set down to be heard, by consent, special days are appointed by the Courts, generally once a week, at the sitting of the Court.

(*o*) See 3 Geo. II. c. 30.
(*p*) 2 Mad. 147.
(*pp*) Ante, p. 614.
(*q*) 1 J. & W. 1. (n.)
(*r*) Post. 619.

Consent causes.

It is scarcely necessary to observe, that causes so set down must be strictly cases in which all the parties consent, and are competent to consent, to the decree proposed to be taken, or at least in which no party offers any opposition to it. If any opposition should be made to the decree, by any of the parties, the cause will be immediately struck out of the paper.

Cannot be reheard.

It may be mentioned, with reference to the subject of consent causes, that a decree or order made by consent of the Counsel for the parties, cannot be set aside either by rehearing or appeal (*s*), or by bill of review (*t*), unless by clerical misprision any thing has been inserted in the order, as by consent, to which the party had not consented, in which case, Lord Thurlow appears to have considered that a Bill of Review would lie (*u*); if, however, the decree has been obtained by fraud, relief may be had against it by original Bill (*x*). The consent of Counsel to a decree, is to be given upon their own conception of the authenticity of their instructions (*y*), and as the Client is bound by the act of his Counsel, he must, if the Counsel has consented without sufficient authority, seek his remedy against the Counsel (*z*). It has been before stated (*a*), that although, where infants are concerned, the Court does not usually make a decree by consent, without first referring it to the Master to inquire whether it will be for their benefit, yet, if such a decree is made, the infants will be bound by it.

Authority to consent.

In cases of infants.

Of advancing causes *pro forma*.

Sometimes a cause will be advanced to the head of the paper, *pro forma*, to enable a witness attending from a Public Office in the country, to prove a document and return: this is frequently done in cases where it is necessary to produce an original will from the Registry of the Prerogative Court of York or from any inferior ecclesiastical jurisdiction; which is

—to produce a will.

(*s*) Brandish v. Gee, Amb. 229; Harrison v. Rumsey, 2 Ves. 488; Belt's Sup. 391; Toder v. Sampson, 7 Bro. P. C. 244; Downing v. Cage, 1 Eq. Ca. Ab. 165, pl. 4; Norcott v. Norcott, 7 Vin. Ab. 298. 10; Windham v. Webb, Neem. 127. Vide, contra, Butterfield v. Butterfield, 1 Ves. 133, 154, and Belt's Supp. 81; Hibbert v. Hibbert, 3 Mer. 682.

(*t*) Webb v. Webb, 3 Swanst. 658, and vide Smith v. Turner, 1 Vern. 274. Ed. Raithby.

(*u*) Anon. 1 Ves. J. 93.

(*x*) Brandish v. Gee, Amb. 229.

(*y*) Mole v. Smith, 1 J. & W. 673.

(*z*) Brandish v. Gee, supra.

(*a*) Ante, vol. 1, p. 103.

Cross Causes.

Cause not in the paper called on.

always necessary where a will of real estate is to be established by the decree of the Court. In one case an application was made to the Court, that a cause, which was not in the paper for the day, might be immediately called on for the purpose of proving a will, the proper Officer having come up from York with the original, for that purpose and being detained in town at a considerable expense, the application was granted, and the cause having been called on, the will was produced, by the proper officer, to the Registrar (*b*).

Of advancing cross causes.

Where original and cross causes are set down, the one preceding the other, and some other causes intervene, the plaintiff in the original cause, if the cross cause has acquired priority in the paper of causes, or *vice versa*, may (if necessary,) move for leave to bring forward his cause, so that both original and cross cause may come on for hearing at the same time, or that the cross cause or original cause, as the case may be, may stand adjourned, in order that both causes may be heard together (*c*).

Upon an application of this sort, it may be necessary to engraft a request that the depositions (if any,) taken in the original cause, may be read at the hearing of the cross cause, *et sic e converso* (*d*); it is to be noticed that such an order, when obtained, may be made use of by the other side, without notice, unless he is, upon special reason shewn to the Court by the party first obtaining the same, inhibited by the same order from so doing (*e*); but it is necessary that a subpœna to hear judgment should be served in each cause; for the cause of that party who omits serving this process, shall not come on at the same time with the other party's, unless the latter consents to it (*f*).

—or supplemental causes.

The same application may also be made, by the plaintiff, where there are original and supplemental causes entered for hearing in the same paper, with other causes intervening.

No cause advanced without certificate of pleadings filed.

By a general order of the Court, no motion shall be made to hasten a cause to hearing, that is either adversary or by

(*b*) Anon. 4 Mad. 271.
(*c*) Hind. 415.
(*d*) Ibid.
(*e*) Beames's Ord. 194.
(*f*) 1 Harr. ed. Newl. 311.

consent, nor cause entered with the Registrar for hearing, notwithstanding any order, without a certificate first had from the Six Clerks, that the pleadings are filed, for which no fee is to be taken (*g*).

Adjournment.

Adjournment of causes

If the party who procures a cause to be set down for hearing, is not ready to hear it, at the day, he must ask the Court to allow it to stand over to another day; such an application, however, will not be granted, unless upon the terms that the party making it shall pay to the other the costs of the day (*h*). These costs formerly differed in the different Courts: those before the Lord Chancellor and Vice-Chancellor being 5*l.*, whilst before the Master of the Rolls they were only 3*l.* 6*s.* 8*d.* By Lord Lyndhurst's Orders (*i*), however, this distinction has been done away, and it is directed that where a cause being in the paper for hearing is ordered to be adjourned upon payment of the costs of the day, there the party to pay the same, whether before the Lord Chancellor, the Master of the Rolls, or the Vice Chancellor, shall pay the sum of 10*l.* unless the Court shall make order to the contrary.

—not permitted, unless upon terms of paying the costs of the day.

Costs of the day, under new practice.

Where more defendants than one.

It is to be observed that, where there are more defendants than one, the sum of 10*l.* is not payable by the plaintiff to each of the defendants, but is divisible amongst them all (*k*), and that the party setting down the cause may obviate the necessity of paying it at all, by applying to have the cause adjourned before it comes into the daily paper.

The most usual reasons for applying to adjourn a cause, are the discovery of some defect in the pleadings which may render an amendment of the Bill, or the filing of a supplemental Bill, necessary,—the circumstance that the cause is likely to come on for hearing before publication has passed, (which may happen in cases where the defendant has obtained an order to enlarge publication on condition that it is not to delay the plaintiff in setting down his cause (*l*).)—or the fact that the suit is under compromise: in such cases, an application should be made to the Court, by motion or petition, for

(*g*) Beames's Ord. 287.
(*h*) Hind. 416.
(*i*) Ord. 1828. xxxv.
(*k*) Ch. Rep. Expl. Paper, Prop. 58, p. 85.
(*l*) Ante, p. 569.

Adjournment. an order to adjourn the cause before it appears in the daily paper of causes; otherwise the Court, instead of adjourning the cause, will order it to be struck out of the general paper, and thereby impose upon the plaintiff the necessity of again setting it down; in which case he will be within the operation of the 34th Order (*m*), which directs that when a cause, which stands for hearing, is called on to be heard, but cannot be decided by reason of a want of parties, or other defect on the part of the plaintiff, and is, therefore, struck out of the paper, if the same is again set down, the defendant or defendants shall be allowed the taxed costs occasioned by the first setting down, although he or they do not obtain the costs of the suit.

It is to be observed, that a cause will not be adjourned because a cross-bill has been filed, to which no answer has been put in. The proper course, in such cases, is, when the cross-bill has been filed in due time, to move to stay publication in the original cause, till the answer to the cross-bill has come in (*n*).

Papers for the Judge.

The plaintiff's Solicitor should take care, before a cause is called on, to furnish the Judge who is to hear it, with a copy of the title of the cause, and of the prayer of the Bill; he should also, as well as the Solicitor for the defendants, be in attendance, either by himself or his Clerk, when the cause is called on, and during the hearing. In order to enforce the performance of this duty, on the part of the Solicitors, the 36th of Lord Lyndhurst's Orders directs, that 'Whenever, upon the hearing of any cause, or other matter, it shall appear that the same cannot, conveniently, proceed, by reason of the Solicitor for any party having neglected to attend personally, or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the Court, and which, according to its practice, ought to have been delivered, such Solicitor shall personally pay, to all or any of the parties, such costs as the Court shall think fit to award.'

Attendance of Solicitor.

—Of Clerks in Court not required.

It seems, formerly, to have been considered necessary, that the Clerks in Court, on both sides, should attend at the hear-

(*m*) Ord. 1828.

(*n*) Coates v. Pearson, 4 Mad. 262, *vide ante*, 563.

ing of every cause before the Lord Chancellor, and, by an Order of the 18th of June, 1686 (*o*), they are directed to attend the Master of the Rolls; this attendance, however, appears to have grown into desuetude, and, by a recent order, it has virtually been limited to cases in which it is absolutely necessary; by that order (*p*) it is directed, "that the sworn Clerks of the Court, and the waiting Clerks, shall not be entitled to receive any fees for attendance in Court, except in cases when they shall actually attend, and when their attendance shall be necessary."

Where Defendant does not appear.

—unless when absolutely necessary.

The causes in the paper for the day, are generally called on by the Registrar in the order in which they there stand (*q*). If upon a particular cause being called and the bill opened, the defendant does not appear to open his answer, the Court calls on the plaintiff to prove service upon him of the subpœna to hear judgment, and, then the affidavit of service being read (*r*), and it appearing to the Court that the defendant has been regularly served with the subpœna, the plaintiff's Counsel prays to have a word of the defendant's answer read. The formal words at the beginning of the defendant's answer, are then read, in order to shew that an answer has been filed, and that there is a *lis contestata* in the suit (*s*), (for this purpose the plaintiff's Solicitor must take care to have the office copy of the answer in Court properly signed by the Six Clerk, otherwise the Six Clerk may object to its being read.) and the plaintiff's Counsel may then pray such a decree as he thinks the plaintiff entitled to; or, more commonly, the Court directs the plaintiff to take such a decree as he can abide by (*t*). The decree, in such cases, is drawn up with a declaration that '*it shall be binding on the defendant unless he, on being served, with a subpœna to shew cause against the same, shew unto the*

Proceeding where defendant does not appear.

Decree *nisi*.

(*o*) Beames's Ord. 267.

(*p*) Ord. 1828. xxxvii.

(*q*) It seems that if a Peer of the realm is interested in a cause and comes upon the Bench, it is usual, after the cause then in hearing is over, to call on his cause before the others which are above it, if, however, the Peer's cause stands low down in the paper, and the adverse Counsel say they are not ready, but will be so when the cause is called on in its course, the Court will not force them to go on, and the nobleman must wait till his cause is called and comes on in its course. For. Rom. 154.

(*r*) Vide ante, p. 612.

(*s*) For Rom. 151.

(*t*) 1 Harr. Ed. Newl. 310.

Where the Defendant does not appear.

Court good cause to the contrary' (u). This is called a decree *nisi*, and in praying it, the Counsel for the plaintiff ought to be very careful to embrace in it such directions only as he will be able to support in case the defendant appears to shew cause. And it is to be observed that, when the object of the Bill is to establish a will against an heir at law, the Court, notwithstanding he makes default, will order the proofs of it to be read, for the will could not otherwise be declared to be well proved (x).

Not a judgment of the Court.

A decree of this nature is not considered as a judgment of the Court, but as the act of the party who obtains it, conceiving what the judgment of the Court would be if the other party had appeared, and it is taken at the peril of the party obtaining it, if he cannot support it by his pleadings and proofs (y). In this respect it differs from a decree taken *pro confesso*, which, as we have seen, is the act of the Court and not of the party (z).

Cannot be made after adjournment.

A decree *nisi* is, however, only made where the party makes default upon the cause being originally called on; if the defendant appears when the cause is called on, and the bill and answer are opened, but the further hearing is adjourned, if the defendant makes default at the adjourned hearing, the decree will be absolute, for the second hearing is to be considered as a continuation of the former when he did appear (a). Thus where, after the cause was called on, all parties being in Court and the pleadings opened, it was referred to arbitration, but nothing being done, the cause came on again for hearing and the defendant made default, the Court pronounced an absolute decree against him (b).

Proceeding where plaintiff does not appear.

The same course of proceeding, *mutatis mutandis*, as that adopted where the plaintiff has set the cause down and does not appear, may be taken where the cause has been set down at the request of the defendant and the plaintiff does not ap-

(u) Vide post, Decrees.

(x) Webb v. Litcot, 3 Atk. 25. Vide ante, v. 1, p. 326.

(y) Carew v. Johnston, 2 Sch. & Lef. 300, and Knight v. Young, 2 V. & B. 186.

(z) Ante, v. 1, p. 695.

(a) Hind. 420.

(b) Halsey v. Smyth, Mos. 186.

pear, in such cases the decree pronounced by the Court will be for a dismissal of the plaintiff's Bill against the defendants, with costs, absolutely (*c*). but the defendant can take no advantage of the plaintiff's non appearance, except the subpœna to hear judgment appears to have been properly served, for otherwise the plaintiff is in no fault (*d*).

Where Plaintiff does not appear.

Where the cause has been set down by the plaintiff, and the defendant's Counsel is ready and appears, and no Counsel appears for the plaintiff, the Court always calls upon the defendant to prove service, upon himself, of the subpœna to hear judgment, this must be done by affidavit in the manner above pointed out; and if the Court is satisfied that the subpœna to hear judgment has been served, it will make a peremptory decree to dismiss the plaintiff's Bill with costs (*e*). It is to be observed, that, if a plaintiff sets down his cause but does not serve the defendant with a subpœna to hear judgment, the defendant cannot have a decree to dismiss, but should, if he wishes to have the suit decided, set the cause down to be heard, *ad requisitionem defendentis*, in which case it is probable that the Bill will be dismissed, with costs, though sometimes a decree is, under such circumstances, made against the defendant (*f*).

Where subpœna to hear judgment has been served.

Where subpœna has not been served.

The method of hearing a cause, where all the parties appear upon its being called on, is usually this:—the plaintiff's Bill is first opened, or the substance of it briefly stated, and the defendant's answer also, by the junior Counsel on each side, after which, the plaintiff's leading Counsel states the case, and the matters in issue, and the points of equity arising therefrom; and then such depositions and parts of the defendant's answer as are called for by the plaintiff's Counsel, are read by the plaintiff's Solicitor or one of his clerks. Formerly, the depositions of witnesses, &c., were, in term time, when the Court sat at Westminster, read by one of the Six Clerks, two of whom were always in attendance for that purpose, but that practice has been discontinued.

Where all parties appear.

(*c*) Hind. 407, 418. *Clark* v. *Wilson*, 24 May, 1775.
(*d*) Ibid.
(*e*) Hind. 419.
(*f*) For. Rom. 15?

Where all parties appear.

Of reading pleadings and depositions.

Pleadings in the cause and depositions are usually read from office copies, which, for this purpose, must be duly signed by the proper officer; the office copies of the depositions must, also, as we have seen, be signed for the party by whom the same are to be read (*g*); that is, they must have been taken by the party intending to use them, and not borrowed from any other party. Office copies of pleadings, are not usually taken by the party by whom they are filed, but each party is allowed to read the original draft of his own pleading, signed by Counsel, and the same credit is generally given to such drafts as is given by the Court to the office copies of them, when made use of by the other side. But neither drafts nor office copies of pleadings are considered, by the Court, as evidence in themselves, and if a doubt is suggested as to their accuracy, the Court will refer to the original record; indeed, the practice of referring either to drafts or to office copies, appears to have been adopted merely to save the Court the trouble of inspecting the original record, which is, nevertheless, always understood to be in Court (*h*).

Upon this ground, Lord Eldon proceeded in *Haddleston* v. *Briscoe* (*i*). In that case, the Bill was filed for the specific performance of an agreement contained in letters which had passed between the plaintiff and defendant. The letters were set out in the Bill, and the defendant, by his answer, admitted the letters, as set out, insisting that they did not amount to an agreement. The cause was heard at the Rolls, and the plaintiff's Counsel having read the admission of the letters from the answer, called upon the defendant's Counsel to produce their office copy of the Bill, in order that the contents of the letters might be read from it; and, upon the defendant's Counsel refusing to produce the office copy, the plaintiff's Counsel proceeded to read the letters from the draft of the Bill. This was objected to, on the part of the defendant, but the Master of the Rolls permitted it to be done. The case

(*g*) Beames's Ord. 301

(*h*) The origin of the Clerk in Court attending in Court, is said to have been, that he should produce the Record, that the Court might inspect it.

(*i*) 11 Ves. 583.

was afterwards re-heard before Lord Eldon, when his Lordship expressed an opinion, that the decree was right, *but that the letters ought to have been read from the record of the Bill, and not from the draft*, and directed the recital in the decree to be altered, by stating it to have been made, 'upon inspecting the record of the Bill,' instead of 'upon inspecting the draft of the Bill.'

Where all parties appear.

It is to be observed, however, that the principal question in the above case, was not as to the propriety of reading from the draft, or from the record, but, whether either ought to have been read, without having received authenticity as an agreement, by having proper agreement stamps imposed upon them; and, upon this point, Lord Eldon, as well as the Master of the Rolls, were of opinion, that the effect of an admission of the letters by the answer, was to dispense with the necessity of evidence, and that, therefore, the stamping of the letters was unnecessary. Lord Eldon's observations upon this point, in giving judgment, are important: 'It has been said, that these letters are not upon stamps. Of the fact there is no proof; nor any allegation, except at the bar. The question upon that, is of great importance to the suitors, not only here, but in every Court of *Westminster Hall*. Soon after the Act was passed, this question was much considered by me. I believe, I made the objection without effect, before Lord *Thurlow*. It is an objection, that has not been acted upon in the vast variety of cases, in which a specific performance has been decreed. Farther, it is an objection, that never availed at law; and wherever an action has been brought upon an agreement, that ought to be on a stamp, and the form of pleading has been such, that at the trial, it was not necessary to produce the instruments, as if it was admitted upon the record, and the trial was upon issues collateral to the existence of the agreement; it has never been considered as open to the Court to examine the question, whether the instrument was legally available with reference to the stamp laws. In this Court, previously to the act, and since, where a suit has been instituted upon a deed,

Stamps upon written documents,

—not necessary upon admissions read from pleadings.

Where all parties appear.

if the defendant admitted the instrument, and put the plaintiff in possession of the power of reading the Bill and answer, the instrument has never been produced; and the Court never examines, whether it was stamped; but leaves the party liable to penalties; except in cases, where the legislature require an instrument stamped, as the only evidence of the transaction; and says expressly, that otherwise the instrument shall not be read in evidence. I do not know, that even that clause makes the production of the stamp necessary, where the transaction is not in issue; for instance, in a suit by an executor for an account, if the defendant admits, that a legacy has been paid, though the legislature interposes the necessity of a receipt, the Court would not inquire, in such a suit, whether such a receipt actually passed. In this view of the case, by analogy to the practice of this Court in other cases, and of Courts of Law, if the party has admitted that, which, if not admitted, the plaintiff must prove, it cannot be necessary to produce that evidence, which otherwise he must have brought forward (*k*).'

Objections for want of stamps,

—taken by the Court.

Cause allowed to stand over.

With reference to the question of stamps upon written documents, read at the hearing of a cause, it may be useful in this place to state, that the Court of Chancery will not receive in evidence, any document which ought to be stamped, without it has the proper stamp affixed to it, and that the Court will itself raise the objection, whether it be taken by the other party or not. If, however, the instrument is of such a nature, that a stamp may be affixed to it on payment of a penalty, the Court will permit it to be so stamped, and will, for that purpose, permit the cause to stand over (*l*).

After the plaintiff's evidence has been read, the rest of the Counsel for the plaintiff make their observations and arguments. Then the defendant's Counsel go through the same process for him, except, that they may not read any part of his answer. The leading Counsel for the plaintiff, is then heard in reply, and concludes the argument (*m*). When all are heard, the Court pronounces the decree, the minutes of

(*k*) Vide Huddlestone v. Briscoe, 11 Ves. 595.

(*l*) Ibid. Coles v. Trecothick, 9 Ves. 231.

(*m*) Hind. 412.

which are generally taken down by the Registrar, and are sometimes read, by him, openly in Court (*n*).

Upon Bill and answer.

Where cause has been set down upon Bill and answer.

The course of proceding is much the same, where the answer has not been replied to, and the cause has been set down for hearing, upon Bill and answer only, in such case the answer is to be wholly read, and must be admitted to be true in all points; and no other evidence is permitted to be read, unless matters of record to which the answer refers, and are provable by the record itself; or documents which may be proved *viva voce*, at the hearing (*p*).

Dismissal upon.

If the plaintiff goes to hearing on Bill and answer, and the Court shall not see cause to make a decree thereupon, for want of sufficient matter confessed by the answer, the Bill will be dismissed with costs. By the common course of the Court, the costs payable by the plaintiff, on the dismissal of his Bill, upon a hearing upon Bill and answer, are 40*s.* (*q*). In consequence, however, of the Statute 4 Ann. c. 16, s. 23, which has been before referred to (*r*), as directing, that upon interlocutory applications to dismiss Bills, either by the plaintiff himself, or by the defendant for want of prosecution, the plaintiff should pay to the defendant the taxed costs of the suit; plaintiffs were in the habit of setting down their causes, to be heard upon Bill and answer, in order to evade the payment of full costs, to which they would have been liable, had they moved to dismiss their own Bills, or suffered them to be dismissed for want of prosecution; and, in order to correct this, Lord Hardwicke made an order (*s*), providing that, where any cause shall be brought to a hearing upon Bill and answer, and such Bill shall be dismissed, the Court may order such dismission to be either with 40*s.* costs, or with costs to be taxed by the master, or without costs, as the Court shall think fit (*t*). It is to be observed, that, previous to the making of this order, Lord Hardwicke had given taxed costs on dismissing a Bill, when

Costs.

In what cases taxed costs will be given.

On the ground of vexation:

(*n*) Ibid. Vide post 'Decrees.'
(*o*) Hind. 416.
(*p*) Ante, p. 441.
(*q*) Hind. 417.
(*r*) Ante, 353.
(*s*) 27th April, 1748; Beames's Ord. 450. Attorney-General v. Parker, 3 Atk. 578; Cowdell v. Tatlock, 3 V. & B. 19.
(*t*) Beames on Costs, 231.

On Bill and answer.

—but not in other cases.

the cause had been heard on Bill and answer (*u*), and that, since the order, full costs have been given under it, against the plaintiff, but on the ground of vexation only (*x*). For it seems to have been the intention of Lord Hardwicke, in making the above order, not to alter the original practice, except in cases of vexation. Thus, in *Bayly* v. *the Corporation of Leominster* (*y*), where Lord Thurlow had dismissed a Bill, when the cause had been heard upon Bill and answer, with costs, he afterwards entertained a motion to vary the minutes, by reducing the costs to 40*s*., according to the usual course of the Court, saying, that Lord Hardwicke's Act, did not alter the practice generally, but gave a discretion to vary it, if a special case was made. It is to be observed that, where a Bill for the redemption of a mortgage is ordered, by a final order under a decree, to be dismissed in consequence of the non-payment of the principal money and interest reported due by the Master, such dismissal is always 'with costs, to be taxed by the Master (*z*).'

Secus in suits to redeem, &c

In what cases the plaintiff will be permitted to reply, after hearing upon Bill and an-

In general, where a cause has been brought on for hearing upon Bill and answer, and the plaintiff fails in making out his case for want of a full admission of it by the answer, the Court will permit him, (if he desires it,) to reply, on paying down five pounds (*a*), and such other costs as the Court shall think fit, for the day, within four days after such hearing. Thus where a Bill was brought against three several executors of three joint factors, one of whom swore 'he believed and hoped to prove' that the plaintiff was satisfied his demands, whereupon the plaintiff replied against the other two, and brought the cause on by Bill and answer against the third, it was insisted that the plaintiff could have no decree for thus bringing on his cause, for though the defendant had not directly sworn by his answer that the money was paid, yet as he had

(*u*) Johnson v. Brown, 3 Atk. 1.
(*x*) Mansel v. Bowles, 1 Bro. C. C. 403; 2 Dick. 646, S. C.
(*y*) 1 Ves. Jr. 476.
(*z*) Newsham v. Gray, 2 Atk. 287.
(*a*) This was formerly the amount of costs of the day, but they are now increased to 10*l*. Ord. 1828, XXXV. ante, p. 619.

sworn he believed and hoped to prove it paid, and the plaintiff by not replying had precluded him from the benefit of his proof, what the defendant stated upon his belief must be taken to be true, and the plaintiff was ordered to pay the costs and left at liberty to reply to the answer of the other defendant (*b*).

On Bill and answer.

—*nunc pro tunc.*

It may be observed here, that where, after a cause has come on to be heard, it has been discovered that, through inadvertence, although witnesses have been examined, no replication has been filed, the Court has permitted a replication to be filed *nunc pro tunc* (*c*). The general rule of the Court, however, is, that unless a replication be filed and a subpœna to rejoin served, and the rule to pass publication given, the plaintiff, if he brings the cause on to a hearing, must submit to take the answer as wholly true, because the defendant has been deprived of the opportunity of proving the truth of his answer; for although a defendant is entitled, as we have seen, to appear and rejoin *gratis*, for the purpose of forcing the cause to a hearing, he is not obliged so to do (*d*).

Omission of plaintiff to reply and pay the costs.

If, after a cause has been dismissed, but with liberty to the plaintiff to reply, on payment of costs, within four days after such hearing, the plaintiff does not pay the costs and reply within that period, the dismission must stand, and being signed and enrolled may be pleaded in bar to a new Bill for the same matter (*e*).

Objection for want of parties.

It has been before stated that the proper time for taking an objection at the hearing for want of parties is, after the pleadings are opened, and before the merits are discussed, though the Court has frequently permitted the cause to stand over for the purpose of adding parties at a later period (*f*). With reference to this subject it is to be observed, that if a cause comes on again after it has been put off by the Court for want of formal parties, an objection for want of other parties, which might have been made in the first instance, comes too late (*g*).

(*b*) Barker v. Wyld, 1 Vern. 140.

(*c*) Rodney v. Hare, Mos. 296; ante, pp. 390, 394.

(*d*) Hind. 417.

(*e*) Ibid.; 1 Prax. Alm. 14.

(*f*) Ante, v. 1, 388.

(*g*) Jones v. Jones, 3 Atk. 217.

Costs of causes standing over.

It may be remarked in this place, that when a cause is ordered to stand over, with liberty to the plaintiff to amend by adding parties, the plaintiff is usually ordered to pay the defendant the costs of the day, (10*l*.,) (*h*); but if the defendant has not raised the objection for want of parties by his answer, the present practice is not to allow him his costs (*i*).

Where cause has been struck out.

If, instead of being ordered to stand over for want of parties, the cause is struck out of the paper, so that it is necessary again to set it down and to serve fresh subpœnas to hear judgment, the defendant, if the cause is again set down, is, as we have seen, to be allowed the taxed costs occasioned by the first setting down, although he do not obtain the costs of the suit (*k*).

Private hearing.

In the matter of Lord Portsmouth (*l*), Lord Eldon, before going into his private room for the purpose of proceeding with the further hearing of the petition and affidavits privately, according to appointment, desired that it might be understood that it was the uniform practice in Chancery, as long as the Court had existed, in the case of family disputes, on the application of Counsel on both sides, to hear the same in the Chancellor's private room, and that what was so done was not the act of the Judge, but of the parties themselves in such family cases.

(*h*) Ante, p. 619.
(*i*) Mitchell v. Bailey, 3 Mad. 61.
(*k*) Ante, p. 620.
(*l*) Coop. Rep. 106.

CHAP. XXIV.

OF DECREES.

SECT. I.—*General Nature of Decrees.*

Definition of a decree.

A DECREE is a sentence, or order of the Court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the suit, according to equity and good conscience.

Interlocutory or final.

It is either *interlocutory or final:* an interlocutory decree is when the consideration of the particular question to be determined, or of further directions generally, is reserved till a future hearing; and the further hearing is termed a hearing upon further directions, or upon the equity reserved (*a*).

Interlocutory decrees.

It very seldom happens that a first decree can be final, or conclude the cause. Thus, if any matter of fact is strongly controverted, the Court is so sensible of the deficiency of trial by written evidence, that it will not bind the parties thereby, but will direct the matter to be tried by a jury; but, as no jury can be summoned to attend the Court of Chancery, the fact is usually ordered to be tried at the bar of one of the Courts of Common Law, or at the assizes. This is effected by means of a *feigned issue;* for, in order to bring the case before the Court of Common Law, and to have the point in dispute and that only put in issue, an action is *feigned* to be brought, wherein the pretended plaintiff declares that he laid a wager of five pounds, with the defendant, that a particular thing was true, viz. that A. was heir at law to B., and then avers that it is so, and brings his action for the five

For feigned issue.

(*a*) Seton on Decrees, 2. In strictness a decree is interlocutory until it is signed and enrolled, For. Rom. 183, but the term is more generally applied to decrees in which some inquiry as to matter either of law or of fact is directed preparatory to a final decision, 1 Newl. 322.

Interlocutory decrees.

pounds. The defendant admits the wager, but avers that A. is not the heir at law to B., and thereupon that issue is joined which is directed out of Chancery to be tried (*a*). The necessary consequence, however, is that till this feigned issue has been tried, no final decree can be pronounced in the cause. The first decree (*b*), therefore, is merely an interlocutory decree directing the issue, and reserving the consideration of the further questions in the cause until after the trial of the issue.

Reservation of further direction,

—directing a case for the consideration of a Court of Law.

So if a question of mere law arises, in the course of a cause, such as whether by the words of a will an estate for life or in tail is created, &c. it is the practice of the Court of Chancery to refer it to the opinion of the Judges of one of the Courts of Common Law, upon a case stated for that purpose, wherein all the facts are admitted, and the point of law is submitted to their decision: who, thereupon, hear it solemnly argued by Counsel, on both sides, and certify their opinion in writing to the Lord Chancellor (*c*); and it is not till after this certificate has been returned that the final decision of the Court can be pronounced.

For a commission of partition, or to settle boundaries.

Sometimes the object of the suit is a commission for a partition of lands, or to settle their boundaries; in such cases, also, the first decree is generally interlocutory, the further directions being reserved till after the commission has been returned. But the most usual ground for not making a perfect decree, in the first instance, is the necessity which frequently exists for a reference to a Master of the Court to make inquiries, or to take accounts, or sell estates, and adjust other matters which are necessary to be disposed of, before complete decision can be come to upon the subject matter of the suit.

For a reference to a Master.

Preliminary inquiries,

—in what cases directed.

It may here be mentioned, that there are some cases in which it is a rule of the Court not to make any decree whatever till certain preliminary inquiries have been made by one of the Masters of the Court; this rule is invariably acted upon in suits for the specific performance of contracts, and the

(*a*) Hind. 429.

(*b*) The word *decree* is not strictly applicable to this description of order, which partakes more of the nature of a direction for a preliminary inquiry, and is generally, therefore, termed 'an order.'

(*c*) Hind. 429.

Interlocutory decrees.

As to title of vendor in suits for specific performance.

Court will not permit the question, whether a good title can be made or not, to be argued before it, in the first instance, even though the objections to the title are stated and the questions arising upon them are properly raised by the pleadings (*d*). This rule, however, is not founded merely in practice, but upon principles which are clearly and accurately defined by Lord Eldon, in *Jenkins* v. *Hiles* (*e*),—'If,' (observes his Lordship,) 'instead of bringing an action of damages for breach of covenant, the plaintiff comes here for a specific performance, the defendant has a right, not only to have such a title as the plaintiff offers upon the abstract authenticated, but, in consideration of the relief sought here beyond the law, to have an assurance about the nature of his title, such as he cannot have elsewhere. Therefore, the Court never acts upon the fact, that a satisfactory abstract was delivered, unless the party has clearly bound himself to accept the title upon the abstract: but though the abstract is in the hands of the party, who says, he cannot object to it, yet he may insist upon a reference. Why? Because the decree compels the other party to produce all the deeds, papers, &c., in his custody or power: from which reasonable or solid objections to the title may be furnished; which would never have fallen under the view of the purchaser, unless the Court wrung from the conscience of the vendor that sort of information, which a purchaser could by no other means acquire. Inquiries and examinations also may be directed; by which the title may be sifted in a way, in which it never could upon a mere abstract, authenticated as the vendor thought proper.'

In what manner vendee may deprive himself of his right.

It is not to be inferred, from the opinion above expressed by the Lord Chancellor, that a purchaser may not preclude himself, by his manner of pleading, from his right to such a reference; for his Lordship goes on to say,—'I have never understood, that the rule has gone this length;

(*d*) Jenkins v. Hiles, 6 Ves. 646;—Rose v. Calland, 5 Ves. 186; Omerod v. Hardman, ib. 722, are apparently at variance with the proposition; sed vide the observations of the Lord Chancellor upon these cases, in Jenkins v. Hiles, ubi supra.

(*e*) Ubi supra.

Preliminary inquiries.

that the defendant, against whom a specific performance is sought, may not by an answer unequivocal, to which he was not drawn by surprise, the propriety of which is not rendered disputable by any subsequent discovery, waive the benefit of this principle; and come here, saying in effect, he trusts the representation of the plaintiff without the obligation of an oath upon his conscience; offering in the first instance to the decision of the Court one neat dry point; upon which alone his objection rests. The rule has not been considered so absolute. But such instances, if they have occurred in practice will not shake the rule; but forming an exception would confirm the general rule' (*f*).—A purchaser may also preclude himself from his right to such a reference by acts *in pais;* such as taking possession of the estate, or exercising acts of ownership over it (*g*). Such acts, however, will not preclude the purchaser from his right to investigate the title, unless the Court is satisfied, from them, that he intended to waive and has actually waived it; and where such an inference could not be drawn from those facts, the Court refused to depart from its ordinary rules (*h*).

Terms of the reference.

It may be noticed here, that the terms in which the direction for a reference, as to the title of a purchaser is framed, is not to inquire whether he could make a good title at the time of entering into the contract, but whether he can, *i. e.* at the time of the reference, make a good title (*i*); and, under such reference, it has been held, that if the purchaser can shew a good title, at any time before the Master's report, it will entitle him to a decree (*k*); and, even after the report, if the vendor can satisfy the Court, that he can make a good title, by clearing up the objections reported by the Master, the Court will make a decree in his favour (*l*).

Rule as to costs.

It is to be observed, that the question, whether a vendor was or was not able to make a good title, at the time of the

(*f*) Jenkin v. Hiles, 6 Ves. 653.

(*g*) Fleetwood v. Green, 15 Ves. 594; Margravine of Anspach v. Noel, 1 Mad. 310; Fordyce v. Ford, 4 Bro. C. C. 494.

(*h*) Burroughs v. Oakley, 3 Swanst. 159.

(*i*) Langford v. Pitt, 2 P. Wms. 630.

(*k*) Mortlock v. Buller, 10 Ves. 292, 315.

(*l*) Paton v. Rogers, Mad. & Geld. 256.

reference to the Master, is a very material one with reference to costs, though not with reference to the decree for a specific performance (*m*), the rule of the Court being, that a vendor is not entitled to costs, except from the time when his title is reported complete; and that, up to that time, he must pay costs himself (*n*). In consequence of this rule, the Court has adopted the practice, at the same time that it refers it to the Master, to inquire into the vendor's title, to direct the Master, in case he shall be of opinion that a good title can be made, to inquire and state to the Court, when it was first shewn that it could be made (*o*): this was formerly done only upon further directions (*p*), but now it is generally embraced in the original order (*q*). If, however, the reference to inquire when the title was first shewn, is not included in the first order, the defendant is not precluded from obtaining it after the report (*r*); and, in *Jennings* v. *Hopton* (*s*), an order to that effect was obtained, upon motion, before the report.

Preliminary inquiries.

Inquiry where good title was first shewn.

It is to be recollected (*t*), that it is a fundamental principle of Courts of Equity to make as complete a decision upon all the points embraced in a cause, as the nature of the case will admit, so as to preclude, not only all further litigation between the same parties, but the possibility of the same parties being at any future period disturbed or harassed, by other parties claiming the same matter, as well as of any danger that may exist of injustice being done to other parties who are not before the Court in the present proceedings.

As to persons interested.

(*m*) Seton v. Slade, 7 Ves. 279.

(*n*) Harford v. Purrier, 1 Mad. 532; Wynn v. Morgan, 7 Ves. 202; Wilson v. Allen, 1 J. & W. 623.

(*o*) Seton on Decrees, 209.

(*p*) Seton on Decrees, 211; Gibson v. Clarke, 2 V. & B. 103.

(*q*) Harding v. Beckford, Seton on Decrees, 209; Wright v. Bond, 11 Ves. 39; Jennings v. Hopton, 1 Mad. 211; Anon. 3 Mad. 495.

(*r*) Seton on Decrees, 211; Gibson v. Clarke, ubi supra; Daly v. Osborne, 1 Mer. 382; Birch v. Haynes, 2 Mer. 444.

(*s*) Ubi supra; sed vide Hyde v. Wroughton, 3 Mad. 279; Lubin v. Lightbody, 8 Pri. 606.

(*t*) In order to prevent delay and unnecessary expense, the Court has adopted the practice, in suits of this nature, where the title of the vendor only is in dispute, of directing references to be made to the Master, to inquire into the vendor's title, upon motion, either before or after answer. Vide post, Interlocutory Applications.

Preliminary inquiries.

As to next of kin;

Acting upon this principle, the Court, in all cases relating to the distribution of the estate of an intestate will, before it makes any decree affecting the estate, or even orders an account of it to be taken, direct a Master of the Court to inquire, and state to the Court, who were the next of kin of the intestate, at the time of his decease, and whether any of them are living or dead, and, if dead, who are their personal representatives.

An inquiry of this nature is always directed, in cases in which any part of the property in question in the cause devolves upon the next of kin, whether it be upon a total, or upon a partial or constructive intestacy; and, although instances have occurred, in which, at the same time that it has directed an inquiry, as to who are the next of kin, the Court has gone on to order the taking of the accounts, &c., in the same manner that it ordinarily does, after it is satisfied that the next of kin are all before it (*u*); yet, of late, it has been the practice, in all cases where the next of kin are concerned, to confine the decree, in the first instance, to an inquiry as to the next of kin, and to reserve all further directions (*x*).

—as to persons constituting a class.

The same course is generally pursued in other cases, in which there is a fund distributable amongst persons constituting a particular class, consisting of numerous individuals, as in the case of a bequest to the cousins of a testator, &c.; in such cases, as well as in that of intestacy, the Court will, before it directs any steps to be taken, either towards a distribution, or for ascertaining the amount of the fund, satisfy itself, by a previous reference to the Master, that all the individuals, constituting the class amongst whom the fund is distributable, are parties to the proceeding: it will, also, adopt the same course of proceeding, where the property is distributable between one of two or more classes of individuals: and, where the plaintiff has filed his Bill, in the character of an individual belonging to a particular class, the Court has directed a preliminary inquiry, whether he is or is not within that class; thus, where the plaintiffs filed their Bill in the character of

(*u*) Vide Beat v. Birch, and John v. Jones; Seton on Decrees, 73. Appx. I. II.

(*x*) Ibid.

next of kin, an inquiry was directed, as to whether they did or did not come within that description (y). And, even where the plaintiff claimed as heir at law of a person deceased, through a great number of descents, and, in support of his claim, had examined witnesses to prove that he filled that character, the Master of the Rolls, Sir John Leach, before he would hear the cause, directed the Master to inquire, who was the heir at law of the deceased (z).

Preliminary inquiries.

As to the plaintiff's right to the character he assumes.

It has been observed, that a decree of this description, is 'not properly a decree in the cause, but rather a preliminary interlocutory order, with a view to inquiry, before the Court can do any thing determining the rights of the parties (a).' It is, in fact, more in the nature of a '*decretal order*,' than of a decree; it determines no right, and establishes no interest in any party, and can scarcely be made the subject of appeal. It is not, however, strictly speaking, a 'decretal order,' which is an order in the nature of a decree, made upon motion or petition, such as the order which has been before referred to, as being made upon motion before hearing, in suits for the specific performance of contracts, for a reference to a Master to inquire into the vendor's title, &c. (b). Of the same nature, are orders made in foreclosure suits, under the Statute, 7 Geo. 2, c. 20, upon application by the defendant, having the right to redeem, for a reference to the Master to inquire into the amount of the principal money and interest due to the mortgagor, and all orders made under the General Order of the 9th May, 1839, Ord. V. for a reference to the Master upon motion to make the inquiries and take the accounts therein mentioned (c). Orders made upon petitions, addressed to the Court in a summary manner, either on behalf of infants, or under the authority of Acts of Parliament, also come under the denomination of decretal orders; as do also those orders which are made upon petitions, presented under the authority of decrees, which, although final with regard to the persons having the immediate interest in

Decretal orders.

(y) John v. Jones, ubi supra.

(z) Cogan v. Stephens, 13th June, 1831, MS.

(a) Vide Horwood v. Schmedes, 12 Ves. 311, 315.

(b) Ante, p. 631.

(c) Vide post, Interlocutory Applications.

Decretal orders. the property, in the hands of the Court, reserve a right to parties who, upon the determination of the immediate interest, shall be interested in the property, to apply to the Court touching the same, as they shall be advised.

Reservation of further directions, may be repeated.

It is to be observed, that the reservation of further directions, is not confined to the first decree, but will be repeated in every decree in which it may be necessary to direct a reference to a Master (*c*); it is also to be observed that, after such a reservation, the Court will not interfere upon the matter reserved in a summary way, but the cause must be set down for hearing (*d*).

Final decrees.

When a decree does not reserve the consideration of the points of equity, arising upon the determination of the legal rights of the parties, or of the further directions consequent upon the Master's report, or the costs of the suit, it it is said to be a 'final decree,' and, when duly signed and enrolled, may be pleaded in bar to any new Bill for the same matter (*f*). Of this nature is a decree (*e*) dismissing the plaintiff's Bill, which, as we have seen before, may be pleaded in bar to a new suit, unless accompanied with a direction that the dismissal is to be without prejudice to the plaintiff's right to file another Bill (*g*). Directions of this sort are inserted, where the dismissal is occasioned by any slip or mistake in the pleadings or in the proof: thus, formerly, where a Bill was dismissed for want of parties, it was expressed to be without prejudice (*h*); and so where a Bill was dismissed, in consequence of facts not having been properly put in issue (*i*), or of the agreement for the specific performance of which the Bill was filed, turning out, upon the evidence, to be different from that actually proved (*k*). In

Dismissing Plaintiff's Bill,

—without prejudice to new Bill,

(*c*) Seton on Decrees, 36.

(*d*) Ibid.; Cooke v. Gwyn, 3 Atk. 689.

(*e*) The order for dismissing a Bill at the hearing is not usually termed, in the books, 'a decree,' but merely 'an order of dismission;' but, to prevent confusion it is thought best to designate it as '*a decree*,' to distinguish it from 'an order to dismiss' made upon motion.

(*f*) Ante, p. 175. Strictly speaking, the term final decree, is only applicable to decrees which have been signed and enrolled, ante, p. 631. (n.)

(*g*) Ante, p. 175.

(*h*) Seton on Decrees, 382. Now however, a Bill is seldom dismissed for want of parties, ante, v. 1, p. 388.

(*i*) M'Neil v. Cahill, 2 Bligh, 263.

(*k*) Woollam v. Hearn, 7 Ves. 222; Lyndsay v. Lynch, 2 Sch. & Lef. 1.

Stevens v. *Guppy* (*l*), a Bill for specific performance was dismissed without prejudice, because it was clear, that the plaintiff was entitled to compensation, although he was held to be precluded, by the frame of the Bill, from insisting upon it.

Final.

Or to proceeding at law.

It is to be observed, that although a decree of dismissal of a Bill, for the specific performance of an agreement, does not carry with it an implied injunction against a subsequent proceeding at law, it is, nevertheless, the constant practice of the Court, to insert in the decree of dismissal of such a Bill, that it shall be without prejudice, &c. (*m*). The only use, however, of introducing such words, appears to be. to prevent an unfavorable impression being made against the plaintiff, upon the trial at law (*n*); and, whether it be introduced or not, the plaintiff, after his Bill for a specific performance has been dismissed at the hearing, is still considered by the Court of Equity, as at liberty to bring his action at law, upon the contract, unless the Court thinks proper specifically to restrain him, by injunction, from so doing (*o*); the most usual course of preventing a plaintiff from proceeding at law, after a dismissal in a case of this nature, is to dismiss the Bill without costs, on the plaintiff's undertaking not to bring an action; this, however, is only by way of compromise (*p*).

Retaining Bill with liberty to bring an action

It is to be observed, that the Court will, sometimes, not only acknowledge the plaintiff's right to bring an action upon an agreement, although it dismisses his Bill, but it will, in express terms, give him leave to bring his action upon the agreement (*q*). This course of proceeding is not confined to cases of contracts, the Court will, in other instances, notwithstanding it decrees a dismission of the Bill, reserve to the plaintiff the right to bring an action at law; and it not unfrequently happens, that the Court, instead of making a decree for an immediate dismissal of the Bill, will direct it to be retained for twelve months, with liberty to the plaintiff, in the meantime, to proceed at law, as he shall be advised; in which case, it forms a part of the decree, that, if the plaintiff shall not

(*l*) 3 Russ. 171.

(*m*) Mortlock v. Buller, 10 Ves. 292; M'Namara v. Arthur, 2 Ball & B. 349.

(*n*) Ibid. (*o*) Ibid.

(*p*) Ibid.

(*q*) Edwards v. Hodkin, Seton on Decrees, 382.

Final.

proceed at law, and go to trial within the time aforesaid, the plaintiff's Bill is from thenceforth to stand dismissed with costs, &c. (*r*), but that, in case the plaintiff shall proceed at law and go to trial, as aforesaid, within the time aforesaid, then the Court doth reserve the consideration of the costs of this suit, and of all further directions, until the Master shall have made his report.

—does not admit plaintiff's equity.

The cases in which the Court retains the Bill, with liberty to the plaintiff to proceed at law, are those in which it is necessary to establish his right at law, in order to found the equitable relief (*s*); and the practice cannot be made use of to enable the plaintiff to try whether he has any claim at law; and if he fails there, to come into this Court and try to raise an equity (*t*). And it is to be remarked, that although, in one case (*u*), Lord Thurlow appears to have expressed an opinion that the Court, by retaining the Bill for a year, has admitted the plaintiff's right to equitable relief, yet the better opinion seems to be, that such is not the necessary consequence, and that the Court may ultimately determine against the plaintiff, although the Bill has been retained (*x*).

Further directions only reserved in the event of a trial.

It appears, formerly, to have been the practice, in decrees of this description, to reserve further directions, whether the action was prosecuted within the time limited or not, but latterly further directions are only reserved in the event of the trial taking place (*y*).

Where no trial has been had.

In cases, however, where default is made in bringing the action, the Bill will not be out of Court, unless the decree expressly directs that, upon default, the Bill is to stand dismissed '*without further order* (*z*).' In *Cator* v. *Dewar* (*a*), it was held,

Further order to dismiss.

that such further order could not be obtained upon motion, and that the cause must be set down for further directions: but in *Stevens* v. *Praed* (*b*), it was held, that it might be obtained on motion also.

(*r*) Seton on Decrees, 356.

(*s*) Walton v. Law, 6 Ves. 150.

(*t*) Ibid.

(*u*) Duke of Leeds v. Corporation of New Radnor, 2 Bro. C. C. 518.

(*x*) Seton on Decrees, 357; Harwood v. Oglander, 6 Ves. 225; and vide Curtis v. Curtis, 2 Bro. C. C. 629; Geast v. Barker, ib. 61, Ed. Belt. (notis.)

(*y*) Seton on Decrees, 357; and vide Stevens v. Praed, 2 Cox. 376; Cole v. Dyer, L. C. 27th Jany. 1747.

(*z*) Seton on Decrees, 357.

(*a*) Ibid.

(*b*) Ubi supra.

Final. —in what cases necessary.

It may be noticed, in this place, that, in general, when a Bill is ordered to be dismissed upon a contingent event, the established rule is that such orders are not conclusive, unless the words 'without further order,' are annexed to the order, and that, where such words are omitted, the defendant must apply for and obtain an absolute order of dismission (*c*). In this respect, however, the rule acted upon, where an order is made for a cause to stand over for a limited time, with liberty to the plaintiff to add parties, and, in default thereof, that the Bill should stand dismissed with costs, &c., is different; for it seems that, in such cases, the Bill is actually out of Court, without further order (*d*); because, the defendant has it not in his power to set it down again in a fit state to be heard, inasmuch as he is not the person to add the parties.

Reservation of liberty to apply.

Although the general rule of the Court is, to make a complete decree upon all the points connected with the case, it frequently happens, that the parties are so circumstanced, that a decision upon all the points connected with their interests cannot be pronounced till a future period; thus, for instance, the interest of a fund may belong to a person for life, and, after his death, the fund may be distributable amongst a particular class of individuals; now, although the persons who form that class, as well as the tenant for life, must be, and in general are before the Court at the time when the [illegible] is pronounced, the Court will not, at that time, take upon itself to declare their interests in the fund; because it is a rule, never to declare rights which are not immediately to be acted upon, lest events should occur, before the time of acting upon them, which may create an alteration in those rights. All that the Court, therefore, does under such circumstances, is to decree the interest of the fund to be paid to the person entitled to the dividends during his life, and to declare that, upon his death, the parties interested in the fund are to be at liberty to apply to the Court as they may be advised. The same sort of liberty is also given in any other

(*c*) Cator v. Dewar, and Stevens v. Praed, ubi supra.

(*d*) Ibid.

Liberty to apply.

case in which it may seem requisite; and it is to be observed, that the effect of it is not to alter the final nature of the decree. A decree, with such a liberty reserved, is still a final decree, and, when signed and inrolled, may be pleaded in bar to another suit for the same matter; the effect of it is, however, to permit persons having an interest under it, to apply to the Court touching such interest, in a summary way, either by petition or motion, without the necessity of again setting the cause down.

In what manner applications may be made.

It may be remarked, that applications, under such a reservation in a decree as that last mentioned, may be made either by motion or petition, except in cases where the object is to have money paid out of Court, in which case the application should be by petition (*e*); unless, indeed, where the title to the fund is clear, as where the money has been carried over to the separate account of the party (*f*), or where the application extends only to the payment of interest, in which cases, it seems, it may be made upon motion (*g*). But although, applications of this nature may be made by motion as well as petition, generally speaking, motions which have for their object to give effect to decrees and orders, should be confined to cases where the order which is to be made upon the motion, arises out of recent proceedings concerning which there can be no doubt (*h*).

Of decree which require a further Order to complete them.

It may be noticed in this place, that there are many cases of decrees which, although they are final in their nature, require the confirmation of a further order of the Court, before they can be acted upon; of this nature are decrees in suits against infants, in which a day is given to the infant to shew cause against it, after he attains twenty-one (*i*). Of the same description, also, are decrees *pro confesso* made against a party absconding to avoid the process of the Court, under the 1st Wm. 4, c. 36 (*k*).

Against infants where a day is given.

Pro confesso against party absconding;

(*e*) Anon. 4 Mad. 228.
(*f*) Heathcote v. Edwards, Jac. 504.
(*g*) Anon. 4 Mad. 228.
(*h*) Lord Shipbrooke v. Lord Hinchinbrook, 13 Ves. 393.
(*i*) Ante, v. 1, p. 225.
(*k*) Ante, v. 1. 370.

The most ordinary case in which a further order is necessary to complete the decree, is that of a decree for a foreclosure. Decrees of this nature, after directing an account to be taken by a Master, of the principal and interest due to the plaintiff upon the mortgage, and the taxation of the costs, direct that, upon the defendants paying to the plaintiff what shall be reported due to him for principal, interest, and costs, within *six months* after the Master shall have made his report, at such time and place as the Master shall appoint, the plaintiff shall reconvey the mortgaged premises to the defendant, &c.; but, in default of the defendant's paying to the plaintiff the principal money, interest, and costs, as aforesaid, by the time aforesaid, it is ordered and decreed that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of and in the said mortgaged premises (*l*).

Where they require final orders.

—of foreclosure.

It is to be observed, that the six months mentioned in the order, are *lunar* and not calender months (*m*), and that the plaintiff must, unless the time has been enlarged, attend either personally or by his Attorney, duly authorized by power of attorney, at the time and place appointed by the Master, to receive the money reported due by him; and if, upon that occasion, the defendant does not attend to pay the money, the plaintiff's right to the estate will become absolute. He must, however, in order to complete his title, procure a final order for confirming it, otherwise the decree of foreclosure will not be pleadable (*n*). The same practice is also to be observed in the case of decrees for the redemption of a mortgage, which usually directs the plaintiff to pay the balances reported due to him, within six months after the report, &c.; in default of which, the plaintiff's Bill against the defendant is from thenceforth to stand dismissed out of Court, with costs to be taxed by the Master (*o*): under this decree, although it directs that in default of payment by the plaintiff, his Bill is to stand

Must have a final order to complete them.

Decrees to redeem.

(*l*) Seton on Decrees, 139.

(*m*) Ibid, 140.

(*n*) Ibid, 144. A release of the equity of redemption after decree, is equivalent to a final order; Reynoldson v. Perkins, 2 Amb. 564.

(*o*) Seton on Decrees, 144.

Where they require final orders.

dismissed with costs, &c., yet it will not be so dismissed without a final order, which however may be obtained as of course (*p*). It may be observed, in this place, that the practice of directing that, upon non-payment of money by the plaintiff, the Bill shall be dismissed, is not confined to Bills to redeem mortgages; thus, in *Lowther* v. *Andover* (*q*), a similar order was made, in the case of a Bill filed on behalf of a purchaser, for the specific performance of an agreement, for the sale of an estate, and the Master was directed to appoint a time and place for the payment of the principal money, interest, and costs, &c., and it was directed that, in default of payment, the Bill was to be dismissed with costs, to be taxed, &c. In such cases, as well as in those above mentioned, a final order is necessary.

Time for payment enlarged in cases of foreclosure.

It may be remarked that, in cases of decrees of foreclosure, the Court will, upon application, enlarge the time for payment of the money, and it seems that formerly it would do this without imposing any terms upon the defendant (*r*), but it afterwards became the practice to do it only upon the defendant consenting to refer it to the Master to compute interest upon the whole sum reported due for principal and interest and costs (*s*); now, however, the ordinary terms upon which the Court enlarges the time are the defendant's undertaking to pay the sum reported due for principal, interest, and costs, and the carrying on the account of subsequent interest and costs, including the costs of the application (*t*).

—Upon the ordinary terms.

On these terms the time will be enlarged for six months, and again for three months (*u*); and in *Edwards* v. *Cunliffe* (*x*),

(*p*) Seton on Decrees, 148. In this case, the defendant will be entitled to taxed costs, though the cause was heard on Bill and answer, ante, p. 627. A final dismissal of a Bill to redeem, is equivalent to a foreclosure; Cholmley v. Countess of Oxford, 2 Atk. 267; Bishop of Winchester v. Paine, 11 Ves 199; but not a dismissal for want of prosecution; Mansard v. Hardy, 18 Ves. 460.

(*q*) 1 Bro. C. C. 397.

(*r*) Ismoord v. Claypool, 1 Cha. Rep. 262.

(*s*) Bickham v. Cross, 2 Ves. 471; Bennet v. Edwards, 2 Vern. 392.

(*t*) Seton on Decrees, 142; Edwards v. Cunliffe, ibid., and 1 Mad. 287; Monkhouse v. the Corporation of Bedford, 17 Ves. 382.

(*u*) Ibid.

(*x*) Ubi supra.

a fourth order was made for enlarging the time, though the third was directed to be peremptory.

Where they require final orders.

Where exceptions are taken to the Report.

It is to be noticed, that, where exceptions are taken to the Master's Report of principal and interest due on the mortgage, application should be made to have the time for repayment of the principal and interest enlarged until the exceptions shall have been disposed of (*y*). Where, however, this was omitted, and pending the exceptions the time for payment elapsed, the plaintiff was not allowed to take a peremptory order to foreclose, but the Court referred it back to the Master to compute subsequent interest, and to appoint a new time of payment (*z*).

Where time elapses before exceptions are argued.

In cases of appeal.

Where a decree of foreclosure was appealed from, the Court refused a motion to suspend the execution of the decree till six months after the appeal should be heard, but directed that on the defendants paying to the plaintiff the interest due from the time of filing his Bill and the costs, (upon the plaintiff's undertaking to repay the same if the decree should be reversed,) and consenting to the appointment of a receiver, the defendants might take six months from the time fixed by the Master's report (*a*).

Time not enlarged in suits to redeem.

Although the Court will, upon a Bill for a foreclosure, allow the defendant, upon application, to enlarge the time appointed for payment of the principal, interest, and costs, it will not do so upon a Bill to redeem, for then the plaintiff comes into Court saying, 'Here is the money, give me the estate,' but in a suit by a mortgagee to foreclose, the Court acts against a person unwilling to pay, and imposes upon him the terms that if he does not pay he shall lose his estate (*b*).

Decrees upon default,

It has been before stated that where a plaintiff setting down a cause brings it on to a hearing, and the defendant, though served with a subpœna to hear judgment, does not attend, the plaintiff will only be entitled to a conditional decree,

(*y*) Renvoize v. Cooper, 1 S. & S. 365.

(*z*) Ibid.

(*a*) Monkhouse v. the Corporation of Bedford, ubi supra.

(*b*) Novosielski v. Wakefield, 17 Ves. 417.

Upon default.

that is, to a decree which can only be made absolute if the defendant, upon being served with a subpœna for that purpose, shall not appear at a certain time and shew good cause to the contrary.

—termed decrees *nisi*.

Decrees of this sort are termed decrees *nisi*, and are incomplete till confirmed or made absolute, which it is necessary they should be, before they can be inrolled or enforced as decrees of the Court.

In what cases made.

The cases in which decrees of this nature will be made, in consequence of the party against whom they are prayed not appearing at the hearing, have been already pointed out, as well as the nature of the clause introduced into them from which they derive their denomination of decrees *nisi*. Except in this clause, they differ little in point of form from ordinary decrees made upon hearing all parties; the principal variation being in the omission of the recital of the evidence (*c*), which, in other decrees, is always entered as read. The omission of the evidence, however, does not extend to cases in which the object of the suit is to establish a will against an heir at law, because in such cases, as has been before stated, the Court will not declare the will well proved without hearing the evidence read (*d*).

Differ from ordinary decrees,

—In the omission of the evidence.

Secus, where suit is to establish a will,

So also if there are several defendants, and one only makes default, the decree is drawn up absolutely as to those who appear, and contains a clause *nisi* as to the one who does not appear (*e*), the proofs, if necessary to the case against the other defendants, must be entered as read. The answer also ought in all cases of this nature to be entered as read (*f*).

—or where there are two or more defendants and one only makes default.

Clause *nisi*.

The clause *nisi*, as we have seen before, directs, *that it shall be binding upon the defendant, unless he, on being served with a subpœna to shew cause, to be served on him for that purpose, shall shew unto the Court good cause to the contrary* (*g*): it also goes on to provide that '*the defendant, before he is to be admitted to shew such cause, is to pay unto the plaintiff his costs* (*h*) *of this*

Subpœna to shew cause why decree should not be absolute.

(*c*) Stubbs v. ——, 10 Ves. 30.

(*d*) Ante, 622; Webb v Litcot, 3 Atk. 25; 1 Dick. 88, S. C.

(*e*) 1 Smith's Ch. Pr. 417.

(*f*) Seton on Decrees, 366; Beames's Ord. 198; Halsey v. Smyth, Mos. 186; For. Rom. 151, 154; Ante, 620.

(*g*) Ibid.

(*h*) Seton on Decrees, 366.

default in appearance, to be taxed by the Master.' The first thing, therefore, to be done by the plaintiff, after he has drawn up, passed, and entered the decree *nisi*, is to serve the defendant with a subpœna to shew cause why the decree should not be made absolute.

Upon default.

The form of this writ, as directed by Lord Brougham's Orders (*i*), is as follows:—

Form of.

Victoria, &c.—To —— *Greeting.* We command you *that within* —— *days after the service of this writ on you, exclusive of the day of such service you do shew unto our High Court of Chancery good cause why a certain decree made by* —— *on the* —— *day of* —— *in a certain cause wherein* —— (and another or others) *are plaintiffs, and* —— (and another or others) *are defendants, should not be binding upon you. In default whereof such decree will stand and be absolute against you.* Witness, &c.

The method of suing out a subpœna of this nature is the same as the method of suing out an ordinary *subpœna ad respondendum*, which has been before pointed out (*k*). When sued out it must be served either personally upon the party, or by leaving a copy of it, at his dwelling house, with some of his family, in the same manner as other *subpœnas* (*l*).

How sued out.

Service of, —must be personal.

It seems, however, that if a party has left the kingdom, or has absconded for the purpose of avoiding service of the *subpœna*, the Court will, upon affidavit of the fact, order service upon the Clerk in Court to be good service (*m*).

Secus where party absconds.

Under the old practice of the Court, there seemed to be no prefixt time for the service of this subpœna, nor was it specified how many days' notice the defendant was to have between the day of service and the day to shew cause (*n*); both these defects are, however, now remedied by the New Orders of the Court, and by the form of the writ as pointed out by them. The 7th of Lord Brougham's Orders directs (*o*), that the time for serving any subpœna, (except for costs,)

Within what time.

(*i*) Ord. 1833.
(*k*) Ante, v. 1, p. 560.
(*l*) Ante, v. 1, 564; Lander v. Whitmore, 2 Dick. 596.
(*m*) Elcock v. Glegg, 2 Dick. 764; Ante, v. 1, p. 243; Vide etiam Hands. Prac. 155, Lander v. Whitmore, ubi supra.
(*n*) Hind. 437.
(*o*) Ord. 1833.

By default.

shall be limited to the last day of the term next following the term or vacation in which it was sued out; and, according to the form of this writ as pointed out at the foot of the Orders, the time of appearing in pursuance of it is limited to a certain number of days after service, exclusive of the day of service. The blank left for the number of days in the printed form is generally filled up in conformity with the old practice which allowed the defendant eight days, exclusive of the day of service of the writ (*p*), within which to shew cause against the decree.

Affidavit of service.

The *subpœna* having been regularly served, an affidavit of the service thereof should be made and filed, and an office copy taken, to be read in Court, and Counsel should be instructed to move to make the decree absolute. This motion should not be made till the day after the time limited in the *subpœna* for shewing cause against the decree has expired, and, previous to making it, that is to say, on the morning of the day after the time for shewing cause has elapsed, application must be made to the Registrar for his certificate, who, thereupon, certifies, in writing, indorsed upon the decree, "that there is not any order entered with the Registrar, whereby cause is shewn to the contrary hereof, to the —— day of ———, [the day on which the motion is made];" upon the motion being made, and the above mentioned certificate and affidavit, being read the order for making the decree absolute will be made of course (*q*).

Motion to make decree absolute.

Registrar's certificate.

Order.

Of shewing cause against decree.

If a defendant means to shew cause against a decree on default, being made absolute, he should apply, by petition, to the Lord Chancellor or Master of the Rolls before whom the cause was set down, stating the decree, and praying that, upon payment of the costs of his default in attendance, the cause may be restored to the paper of causes, and set down to be heard *next after the causes already appointed to be heard*, which will be ordered of course (*r*), upon the terms of paying to the other party the costs of the default to be taxed by the Master.

Order to set the cause down again.

Next after cause already set down.

It is to be noticed here, that, in *The Margravine of Anspach*

(*p*) Hind. 437.
(*q*) Ibid.
(*r*) Ibid.

By default.

May be advanced.

v. *Noel*(s), Lord Eldon expressed his disapprobation of the practice of ordering the cause to be set down next after the causes already appointed to be heard, and directed the cause to be set down for a particular day; but, in *Undershell* v. *Norton*(t), the Master of the Rolls, Sir John Leach, held, that the old practice was correct, but that, upon the cause being set down, either party might apply to have it advanced.

Service of order.

The order for setting down the cause, when passed and entered, must be duly served upon the Clerk in Court of the opposite party (u).

Payment of costs.

We have seen above, that the party applying to shew cause against the decree, must, before he is admitted to do so, pay to the other party his costs of the default, to be taxed by a Master; in consequence of this, the practice is for the person serving the order to set the cause down, to demand, at the same time, the other party's bill of costs, pursuant to the order. This bill of costs must, if the parties differ, be taxed by the Master in the usual manner, and then the amount must be paid or tendered to the adverse Clerk in Court, and a receipt or certificate taken, or an affidavit of the tender and refusal made and filed, after which the party must apply to the Registrar with the order for restoring the cause accompanied by the receipt or certificate of payment, or by an office copy of the affidavit of tender and refusal, who will set the cause down to be heard according to the order. The Registrar, however, will not set the cause down without seeing the receipt or the affidavit of the tender and refusal of the costs (x).

Cause not set unless costs paid or tendered.

If cause not set down shewn against decree.

And, unless the cause be actually set down, the Registrar will not certify that there is no order whereby cause is shewn to the contrary of the decree, the order being considered of itself as no stay of proceedings (y).

Cause heard in the usual manner,

When the cause comes on pursuant to the order for rehearing, the pleadings are opened and the evidence read, and the cause is otherwise heard in the same manner as causes which come on for hearing in the ordinary course (z); and the same

(s) 19 Ves. 537; 1 Mad. 313. S. C.

(t) Seton on Decrees, 358.

(u) Hind. 438.

(x) Vide Beames's Ord. 198, 314.

(y) Hind. 438.

(z) Margravine of Anspach v. Noel, 1 Mad. 313.

By default.

objections may be raised for want of parties (*a*), or upon other grounds, as upon an original hearing.

—and the decision then made absolute.

Whatever decree is then made will be absolute, even though the party again makes default (*b*).

—but rehearing will be permitted,

It is, however, to be observed, that, after a cause has been reheard for the purpose of enabling the defendant to shew cause against a decree nisi, the Court will permit a rehearing of it upon the ordinary terms, even though the effect of the first rehearing of the cause has been to confirm the decree *nisi*. The first rehearing in that case is in fact the original hearing of the cause by the Court, and the decree then pronounced is the act of the Court, which is not the case with the decree *nisi*, which is only considered as the act of the party (*c*), the consequence of which is, that such decree is liable to all the same consequences as a decree made by the Court in the first instance would have been.

—even though defendant has omitted to appear at the rehearing,

But the privilege of having a decree which has been made absolute reheard in the ordinary course, is not confined to cases in which the decree has been made absolute after the cause has been regularly heard under an order obtained for that purpose, as above directed, but it will be permitted even where a defendant having procured an order to set down the cause for rehearing, for the purpose of shewing cause against the decree, has omitted to appear upon such rehearing (*d*). It has also been permitted when the decree has been made absolute upon motion for want of cause shewn: thus, in *Cunyngham* v. *Cunyngham* (*e*), where the defendant, two years after the decree had been made absolute, petitioned for and obtained an order for a rehearing upon the ordinary terms, Lord Hardwicke, although he at first doubted whether such a proceeding was regular, and whether the defendant ought not to be put to move to discharge the order for making the decree absolute, at length determined that the order for rehearing should

—or where a decree has been made absolute for want of cause.

Terms upon which it will be ordered.

(*a*) Jackson v. Lea, 1 Dick. 92.
(*b*) Hankwitz v. Ocarrel, 1 Dick. 109.
(*c*) Carew v. Johnstone, 2 Sch. & Lef. 300; Knight v. Young, 2 V. & B. 186.
(*d*) Hankwitz v. Ocarrel, 1 Dick. 109.
(*e*) 1 Amb. 89.

By default.

not be discharged, but that it should stand, on the defendant's undertaking to pay the costs he ought to have paid for his default in case he had come and shewn cause, to be taxed by the Master; and also such costs of the proceedings, subsequent to the decree, as the Court should award, in case the decree on rehearing should be varied, and the costs of the motion.

Can only be upon petition of rehearing,

It is to be observed that, in the above case, Lord Hardwicke appears to have considered the course adopted by the defendant, of obtaining the order for a rehearing without previously moving to discharge the order to confirm the decree, as having been irregular, although, for the purpose of avoiding the expense and delay of a proceeding to set it aside, he allowed the order to stand upon the conditions above stated. The precedent thus set by Lord Hardwicke, was followed by Lord Eldon, in *Vowles* v. *Young* (e), which appears to have been a case under circumstances nearly similar; his Lordship, however, intimated, that the proper course would have been for the defendant to have made an application to discharge the order for making the decree absolute. But it is to be observed, that, in *Attorney-General* v. *Brooke* (f), where a decree *nisi* had been made and confirmed, the defendant applied to the Court by motion, to discharge the order for making the decree absolute, and for a day to shew cause against the decree *nisi*, but the Lord Chancellor said he thought it would be more fit to rehear the decree upon terms than to discharge the former order, and accordingly directed that the defendant should be at liberty to present a petition to rehear the cause upon such terms as should be just, the same to come on in the regular course with the cause petitions. In pursuance of this order, a petition of rehearing was presented to the Court in the ordinary form, with the usual certificate of Counsel annexed, and the order for a rehearing made upon the terms of paying the relator's costs of the application, and of the previous proceedings in the Master's Office; and it may now be stated to be the general rule of the Court to put the party, applying to open a decree *nisi* which has been made absolute, to a petition for a re-

(e) 9 Ves. 172. (f) 3 Mer. 688.

By default.

—signed by two Counsel;

hearing, rather than allow him, in a summary way, to get rid of the effect of his own negligence by motion (*g*). Such a petition must be presented under the sanction of a certificate by Counsel, in the same manner as an ordinary petition of rehearing, and no affidavit is necessary in support of it, the Court giving credit to the signature of Counsel as a mark that in their opinion the case is proper to be reheard (*h*).

—but may be had after proceedings in Master's Office,

It is to be remarked, that, in the above case of the *Attorney-General* v. *Brooke* (*i*), the parties had actually proceeded under the decree in the Master's Office as far as the preparation of the draft report and that, in *Kinsay* v. *Kinsay* (*k*), where a similar order was made, the Master had actually made his report, which had been confirmed.

—or by plaintiff after cause has been set down by defendant,

An order for a rehearing may be obtained by a plaintiff when the cause has been originally set down for hearing *ad requisitionem defendentis* and a decree for dismissing the Bill made upon default of the plaintiff's appearance (*l*).—Thus, in *Terran* v. *Waite* (*m*), where an order of this nature had been obtained by the plaintiff, upon an application being made to discharge it, it was ordered, that, upon the plaintiff's paying costs to the defendant and consenting also to pay such costs as should be awarded against him on rehearing the cause, the order should stand, or otherwise be discharged.

—undertaking as to costs.

It may be remarked, in this place, that the necessity for requiring the party applying for a rehearing, to enter into an undertaking to pay such costs as the Court shall award against him as was done in the last mentioned case, and also in some of the other cases above referred to, has been obviated by a general order of the Court, of the 30th of April 1700, which requires the party obtaining an order for a rehearing, to deposit 10*l*. with the Registrar, and renders him liable to pay such further costs, as the Court, upon such rehearing, should think proper to direct; and, by the 42nd of Lord Lyndhurst's Orders, which directs that the deposit, upon every petition of appeal or rehearing, should be increased to

(*g*) Vide Knight v. Young, 2 V. & B. 184, 186.

(*h*) Cunyngham v. Cunyngham, ubi supra.

(*i*) 18 Ves. 321.

(*k*) Cited 1 Dick. 145.

(*l*) Ante. p. 623.

(*m*) 2 Dick. 782.

By default.

20*l.*, to be paid to the adverse party, when the decree or order appealed from is not varied in any material point, together with the further taxed costs, occasioned by the appeal or rehearing, unless the Court shall otherwise order (*o*).

Party obtaining decree, may apply for a rehearing.

It is to be observed, that the right to have a decree upon default reheard, is not confined to the party against whom the decree has been obtained; if the party obtaining the decree, finds that he has not taken such a decree as he is entitled to, or has committed an error in the form or substance of it, he may have it reheard upon the usual terms (*p*); he must, however, previously to presenting his petition for that purpose, have the decree made absolute. In *Baxter* v. *Wilson* (*q*), Lord Hardwicke dismissed a petition of appeal upon the ground that this was omitted to be done; but he did so without prejudice to any new petition, in case the party should be advised to present one, and ordered the deposit to be paid back (*r*).

Proofs not read on appeal to the House of Lords.

After a decree by default, has been made absolute by default, and an appeal is carried up to the House of Lords, the House will not allow any proofs to be read by the appellant, because, as we have seen, no proofs are, in such cases, read in the Court below (*s*).

Sect. II.

Of the Form of Decrees.

Decrees consist of three parts;

Before we proceed to the consideration of the practice arising upon decrees when pronounced, it will not be out of place to make a few observations upon their form. Decrees, in general, consist of three parts:—1. the date and title; 2. the recitals; and 3. the ordering part; to which may sometimes be

(*o*) Vide post, Rehearings and Appeals.

(*p*) Baxter v. Wilson, 2 Atk. 152.

(*q*) Ubi supra.

(*r*) Reg. Lib. 1710. fol. 221.

(*s*) Button v. Price, Prec. in Cha. 212.

Recitals.

added 4. the declaratory part, which, when made use of, generally precedes the ordering part.

—date, parties, names, &c.

1. The decree commences with a recital of the day of the month and year when it was pronounced, and of the names of the several parties to the cause; and, it is to be observed, that it is necessary that the parties, both plaintiff and defendant, should have the same titles in the decree, as they have in the Bill (*a*); thus, if the plaintiff is described in the Bill, as executor or administrator, the decree must be accordingly.

Recitals.

2. Formerly, decrees contained recitals of the pleadings in the cause, which were introduced in the following manner:— This cause coming on the ——— instant, and also on this present day, to be heard and debated before the Right Honorable, &c., in the presence of Counsel learned on both sides, the substance of the plaintiff's Bill appeared to be, &c., [then followed a recital of the material parts of the Bill;] therefore, that the defendants. &c., [reciting the prayer,] and to be relieved in the scope of the plaintiff's Bill; whereto the Counsel for the defendants alleged, that they, by their answer, &c.; [then followed a recital of the defence set up by the answer:] whereupon, &c (*b*). In like manner, a decree upon further directions, according to the old form, recited the ordering part of the original decree, and the master's report made in pursuance of it (*c*).

Many attempts have been made by the Judges of the Court, from time to time, to shorten the length of decrees, occasioned by the introduction of the above recitals; and we find in the books, several general orders, which have been promulgated with that view. By the latest of them, (an order of Lord Hardwicke's (*d*),) it is ordered, that in original decrees and orders made on the hearing of causes, the recitals, previous to the exhibits read, be the substance and scope only of the pleadings, tending to the points in controversy, upon which the decree is founded, and be made in a most concise manner, and not to contain any recitals immaterial to the points in issue. It is obvious, that such a method of drawing up decrees as

(*a*) Curs. Canc. 153.
(*b*) Seton on Decrees, 5.
(*c*) Ibid. 9.
(*d*) Vide Beames's Ord. 381.

Recitals.

that directed by the above order, would be very desirable; but to abridge long pleadings in conformity with those directions, requires more care and attention than the Registrars have it in their power, from their numerous and important avocations, to apply to this part of their duty, and the consequence has been, that, the task having necessarily devolved upon incompetent persons, the decrees have not been drawn up with that brevity and conciseness which is desirable, This circumstance, as well as others connected with the subject, were taken into consideration by the Commissioners, appointed in 1826, to inquire into the practice of the Court; who, after bestowing much time and labour in the investigation of the subject, reported that they found, 'that in the opinion of very many experienced persons, the advantage of having the nature and substance of the case set forth in the document which contains the decision, over-balances any evil which results from its length;' and, that they did not propose any new rule as to the form of decrees, although they wished strongly to enforce the propriety of greater attention, than appeared to be paid to the terms of Lord Hardwicke's order in that behalf.

When the names of the Commissioners (*e*) who signed the above report, are taken into consideration, and it is recollected that the opinion they gave was founded upon the examination of some of the most eminent practitioners at the Bar, it is not a little surprising, that the legislature should, without further apparent investigation, have taken the step of introducing a regulation totally at variance with its recommendations; it is, however, the fact, that by the Statute 3 and 4 Wm. IV. c. 94, s. 10, it is enacted 'that, unless the Court shall otherwise specifically direct, no recitals shall be introduced in any decree or order of the Court, but the pleadings, petition, notice, report, evidence, affidavits, exhibits, or other matters or documents, on which such decree shall be founded, shall be merely referred to; and, that it shall be lawful for the Lord Chancel-

(*e*) Containing, amongst others, Sirs John Leach, Charles Wetherall, those of Lords Eldon and Gifford, and Anthony Hart.

Recitals.

lor, if he shall think fit, together with the Master of the Rolls and Vice-Chancellor, or one of them, to make and issue such rules and regulations, as to the forms of such decrees and orders, as he may deem necessary or proper, for the purpose of drawing up such decrees and orders, and carrying into effect the provisions of the Act with regard thereto.'

By Lord Brougham's Orders (*f*), made in pursuance of the above Act, 'for the purpose of avoiding, as much as may be, expense and delay in the drawing of the decrees and orders of this Court, it is directed that, (except in orders for special injunctions, in which the usual recitals shall be inserted as heretofore,) neither the Bill nor answer, nor any part thereof, be stated or recited in the original decree or order; and, that no part of the Master's report be stated in any decree upon further directions, except the Master's finding or opinion upon the subject referred to him; and that, in orders made upon petitions, no part of the petition be stated or recited except the prayer; and, that the same principle of brevity be observed in all the orders of this Court, made upon motion, so far as may be consistent with a statement, explaining the grounds upon which the order is made. And, for the better understanding of the said order, certain forms of decrees and orders, drawn pursuant thereto, are subjoined: And, it is thereby directed, that such forms shall be observed in all cases, as nearly as may be; and that, before any order made on a petition be passed, the original petition be filed with the Clerk of the Reports.'

Of evidence.

It may be noticed here, that the practice of the Court of Chancery, with regard to stating in the decree the evidence read in the cause, is merely to state it generally, without specifying the particular depositions which have been made use of. The entry is in the following words, viz: 'Whereupon, and upon debate of the matter, and hearing the will of J. P., date, &c., and the defendant's answers, and the proofs taken in this cause read, and what was alleged by the Counsel on both sides, &c. (*g*).' This method of entering the evidence in

(*f*) Ord. 1833, XXVII.

(*g*) Seton on Decrees, 5.

Recitals.

the decree, was disapproved of by Lord Keeper North, in *Brend* v. *Brend*(*h*), who said, he would not allow of the practice; and insisted, that the facts which were proved, and allowed by the Court as proved, should be particularly so mentioned in the decree. The practice, however, has nevertheless been continued, and the reference to the evidence is merely general, as above stated, except as to the documents which have been read, which ought to be specified(*i*).

It is to be recollected, that, where a decree is made *nisi*, on the defendant's making default at the hearing, it is not usual, except where the object of the suit is to establish a will, to enter the evidence as read, because, in such case, there can be no appeal against a decree so taken (*k*).

Ordering part.

3. The ordering, or mandatory part of the decree, contains the specific directions of the Court upon the matter before it. These directions must, it is obvious, depend upon the nature of the particular case which is the subject of the decree, and cannot, therefore, now be made the subject of discussion. Where the decree is merely interlocutory, and directs an issue, or a case at law, or an inquiry to be made, or account to be taken by a Master, it usually contains a reservation of the further matters to be decided, and generally, also, of the costs of the suit, till after the event of the issue or case, or of the inquiry or account shall be known.

Reservation of further directions, &c.

Declaration of the rights of parties.

4. Where the suit seeks a declaration of the rights of the parties, the ordering part of the decree, should be prefaced by such a declaration (*l*). This, however, is not absolutely necessary, and the omission of it will not invalidate the decree. Sometimes, the Court directs an insertion, in the decree, of the reasons for making the declaration, and of the grounds upon which it proceeds in making it (*m*). This, however, is not very frequently done, though the utility of the practice has been frequently

(*h*) 1 Vern. 214; and vide Bonham v. Newcomb. ib. 216.

(*i*) The practice in this respect, of the Court of Chancery, differs from that of the Exchequer.

(*k*) Ante, p. 622, Stubbs v. ——, 10 Ves. 30.

(*l*) Jenour v. Jenour, 10 Ves. 568.

(*m*) Gordon v. Gordon, 3 Swanst. 478; Maynard v. Mosely, ib. 653; Onions v. Tyrer, 1 P. Wms. 343; Gibson v. Kinven, 1 Vern. 67 (n.); Exparte Earl of Ilchester, 7 Ves. 373.

Form of.

recognized (*n*); and it seems that as a declaration of the rights of the parties is the act of the Court, it ought not to be introduced where the decree is taken by the plaintiff upon the defendant's making default at the hearing (*o*).

Decrees by consent.

It may be mentioned, in this place, that when a decree is made by consent, it should be so stated in the decree (*p*). Sometimes, it is expressed to be on the consent of Counsel, and sometimes by consent of the parties, or their Clerks in Court, testified by their signing the Registrar's book.

Sect. III.

Of Drawing up, Passing, and Entering Decrees

Minutes of decrees.

It has been before stated, that when the decree is pronounced by the Court, the minutes of it are taken down by the Registrar, and are frequently read over by him in the presence of the parties concerned, or of their Counsel and Solicitors (*a*); copies of the minutes so taken by the Registrar, are usually applied for by all parties, or at least by each party who employs a separate Solicitor in the suit.

How rectified; —by motion or petition.

If, upon perusing the minutes, it appears, that they are doubtfully expressed, or contrary to the plain sense and meaning of the Court, or that any thing has been omitted in them which ought to have been inserted, and the Registrar refuses to make any alteration in them, an application should be made to the Court, that the minutes of the decree may be rectified. Strictly speaking, this application should be made by petition, stating the specific matter to be added or altered (*b*); but it may be by motion, of which notice must be given (*c*).

It is to be observed, that all applications to vary the minutes of decrees, must be made to the Court by which the decree was pronounced, and that the Lord Chancellor has no

(*n*) Bax v. Whitbread, 16 Ves 24; Gordon v. Gordon, ubi supra.

(*o*) Jennings v. Simpson, 1 Keen, 404.

(*p*) Vide Seton on Decrees, 375.

(*a*) In strictness, this ought always to be done, vide Beames's Ord. 270.

(*b*) Grey v. Dickenson, 4 Mad. 464.

(*c*) Harr. 321, Webber v. Hunt, 1 Mad. 13, Punderson v Dixon 5 Mad. 121.

power to alter a decree, made by an inferior Judge, although he himself was that Judge, therefore, where a decree had been made by Lord Cottenham, when Master of the Rolls, an application to him, after he was Lord Chancellor, to vary the minutes of the decree, and which was not consented to, was refused (*d*).

Rectifying minutes.

—or setting down cause to be spoke to.

Sometimes, where a difficulty arises as to the minutes, the Court, instead of a motion or petition, will, upon application of Counsel, allow the cause to be placed in the paper of causes, '*to be spoke to upon the minutes.*' This, however, can only be done, where the decision is recent; in other cases, a motion or petition must be resorted to. Formerly, by an order of the Court (*e*), petitions to rectify minutes, were directed to be presented within six days after the decree or order was pronounced, but, of late years, this rule has not been adhered to; and applications of this nature will, in general, be permitted, provided the decree remains in minutes, if made at any time within the term in which the decree was pronounced, and the seals after it (*g*). Strictly speaking, questions of importance ought not to be discussed upon applications to vary minutes, but this rule is not always adhered to, and discussions of great moment have sometimes been permitted (*h*). The proceedings upon petitions or motions of this description, are the same as those upon other applications by the same means, and if an order to vary the minutes is pronounced, it must be passed and entered and served upon the adverse Clerk in Court, and an appointment made with the Registrar, to settle the minutes as directed by the order (*i*).

Within what time.

Proceedings upon order.

Of drawing up the decree.

The minutes being settled, the party in whose favour the decree is made, then carries the brief given to one of his senior Counsel, to the Registrar of the day when the cause was heard, and bespeaks the decree to be drawn up, and the adverse party usually bespeaks a copy (*k*). The decree is then drawn up by the Registrar, and delivered to the party bespeak-

(*d*) Reece v. Reece, 1 M. & C. 372

(*e*) Beames's Ord. 325

(*g*) 1 Turn. & V. 319.

(*h*) Perry v. Phillips, 1 Ves. jun. 251; and vide Bootle v. Blundell, 1 Mer. 202.

(*i*) Turn. & V. 318.

(*k*) Hind. 430.

Drawing up and passing.

Proceeding, where party having original decree from Registrar, refuses to return it.

ing it. Sometimes the party having received the original decree from the Registrar, neglects to return it to him, whereby the adverse party is delayed in having a copy. This drives the party injured to his remedy, by motion in Court; 'that the adverse party's Solicitor may forthwith return to A. B., the Registrar, the decree made on the hearing of the cause, on such a day, which was by him drawn up, in order that the party applying may have or take a copy thereof, and that the same may be passed and entered.' Notice of this motion must be served, and the order made upon it passed, entered, and served in the usual way (*l*).

Of passing a decree.

The decree being returned, and an office copy taken by the adverse party, the next step to be taken is to have it passed and entered, till which is done the decree is only *inchoate* (*m*).

In order to pass a decree, application must be made to the Registrar, to appoint a day for passing the decree, which he does, by sending a note in writing to the adverse party's Clerk in Court, informing him, that the decree will be passed on such a day, and that he must bring his copy, and attend the passing, or else that he will pass the decree without him. This is done, to give all parties an opportunity of pointing out any errors or objections which they may have, and, if the Registrar cannot rectify them, of applying to the Court, in the manner above stated (*n*). If no objections are made, the decree is passed, by the Registrar affixing his signature thereto. Formerly, all decrees of special matters of difficulty and weight were signed by the Lord Chancellor, on a docket signed by the Six Clerks, in the same manner as when a decree is now inrolled (*o*).

Signature of Registrar, —of Lord Chancellor.

Of entering the decree;

The decree being passed, there is still a remaining form to be observed, before any proceeding can be had upon it, viz., the entry of it in the entering books, at the Registrar's Office; this is done, by leaving the original decree with the proper officer, and the decree appearing by the Registrar's signature to be passed, a true copy thereof is entered, of course, in the books (*p*). If the party in possession of the original decree,

(*l*) Hind. 430.
(*m*) Hind. 431; 2 Freem. 46.
(*n*) Ibid.
(*o*) 1 Smith, Ch. Pr. 425.

(*p*) By Order XXX. 1833, all decrees and orders of the Court, are to be entered by the Clerks of entries under the direction of the

neglects or refuses to enter it, the office copy, regularly passed and signed, may be entered in its stead. The entry of a decree or order is supposed to be completed when it is left with the entering Clerk; and, where it is intended to sue out a writ of *fieri facias* or *elegit* upon it, under the 1 & 2 Vict. c.110 (*p*), care must be taken, that the day of the month and year, in which the same was left for entry, be marked upon it by the entering Clerk, in whose division the same may be; as it is provided by the Orders of the 10th May, 1839 (*q*), that no such writ shall be sued out upon such order, unless the date of such entry shall be so marked. The entering Clerk is bound to mark such date, at the request of the party leaving the decree (*r*).

Entering.

From what time to be considered as entered.

By the 30th Order, of 1833, it is directed, that all decrees and orders shall be entered, within one week after the same shall be left for entry, and that all such entries shall be examined by one of the Clerks of entries, and be marked with his initials, to denote such examination. Under the old practice of the Court, owing to the length of recitals in the decree, delays very frequently occurred in perfecting the entry; in such cases, it was usual to take the office copy of the original decree to the Registrar, who, if the original had been previously left at the entering books, would affix his signature to it, and then the office copy, so authenticated, was sufficient to authorize any proceedings pursuant to the decree: for it is a rule, that unless the original decree appears to be entered, or the office copy is signed by the Registrar, as before mentioned, the Master to whom the matters in the decree are referred for inquiry, will not issue any warrants, or suffer proceedings to be carried on according to the direction of the decree, or if inadvertently, proceedings are had, they are irregular and voidable (*s*).

Effect of entry.

Master of Reports and Entries. The decrees are entered alphabetically, according to the names of the plaintiffs. The books marked A., contain the entries from A. to K. inclusive; those marked B. contain the rest. The year begins with Michaelmas Term, so that, according to the modern computation, the date of the decree does not correspond with that of the book, except in Michaelmas Term. The folios in the books are numbered, but not the pages. Seton on Decrees, 5, n. (1).

(*p*) Vide post, 692, 693.

(*q*) Ord. II.

(*r*) Ibid.

(*s*) Hind. 432.

Entering.

An office copy of a decree, however, signed by the Registrar, is effective for every purpose of proceeding in the cause.

By a general order of the Court, dated 23rd of January, 1646(*t*), it is ordered, that all injunctions, decrees, and dismissions, thereafter to be granted or made by any of the Judges sitting in Chancery, shall be first signed by them, or such of them, as shall first grant or make the same, before the order, whereby the same shall be so granted or made, shall be entered in the register. This order is noticed in several books of practice(*u*), but it is not acted upon, unless in cases in which the decree is intended to be inrolled, in which, as will be hereafter shewn; the docket of the decree must, before inrolment, be signed by the Judge by whom it was pronounced.

—within what time.

The time within which a decree ought to be entered, does not appear from any of the general orders of the Court. By Lord Clarendon's Orders, it is directed, that all decrees and dismissions pronounced upon hearing the cause, shall be drawn up, signed, and inrolled, before the first day after the next Michaelmas or Easter Term after the same shall be pronounced, and not at any time after, without the special leave of the Court(*x*). But this Order is silent as to the *entry* of the decree, the drawing up, (in which may be included the entry,) signing, and inrolling, only are provided for(*y*); but, it has been observed, that, as the entry must precede as well the signing and inrolling, as any proceeding in pursuance of the decree, the order seems to imply, that the entry must be within the time prescribed for the inrolment, and this appears to be the spirit of the Order, though not the letter. The rule, however, with regard to entering decrees, as it exists according to the present practice, is somewhat different; for it seems to be, that all decrees and orders made in Michaelmas and Hilary Terms, are to be entered before the first day of Michaelmas Term following; and all decrees of Easter and Trinity Terms, are to be entered before the first day of Easter Term; or else the party must obtain an order to enter them

(*t*) Beames's Ord. 107.

(*u*) Prac. Reg. 155; Curs. Canc. 351, 1 Pr. Alm. 32.

(*x*) Beames's Ord. 205.

(*y*) Ibid. 433.

Entering.

Nunc pro tunc.

nunc pro tunc (z), without which, a decree, not entered within the time prescribed by the course of Court, cannot be entered.

An order to enter a decree, *nunc pro tunc,* may be obtained, as a matter of course, upon application by motion in Court, or by petition at the Rolls; and, when entered and passed, must be served upon the entering Clerk, at the Registrar's Office, when the decree is left to be entered (*a*).

After a long interval.

It may be observed here, that orders to enter decrees *nunc pro tunc,* will be made, after a very long interval has elapsed, from the time of pronouncing the decree; and that, even where the original decree has been lost, the Court has permitted it to be entered *nunc pro tunc,* from the office copy, after the lapse of 23 years (*b*).

Where decree has been lost,

In *Jesson* v. *Brewer* (*c*), where the pleadings in the cause, as well as the original decree, (which was pronounced 21 years before the application,) were lost: a paper, purporting to be a copy of the decree, was allowed to be entered as the decree, and inrolled, it appearing from the minute book of the Registrar, that such a decree was pronounced at the time, and from a Master's report, that it had been acted upon.

—under Act for abolishing imprisonment upon mesne process.

It may be noticed, in this place, that no decree or order of the Court, will have the effect of a judgment at law, under the Act for Abolishing Arrest on *Mesne Process* (*d*), 'unless or until a memorandum or minute containing the name and the usual or last known place of abode, and the title, trade, or profession of the person, whose estate is intended to be affected thereby, and the Court, and the title of the cause or matter, in which such decree or order, shall have been obtained or made, and the date of such decree or order, and the account of the debt, damages, costs, or monies, thereby recovered or ordered to be paid, shall be left with the senior Master of the Court of Common Pleas, at Westminster, who is directed, forthwith, to

(z) For Rom. 163; 1 Newl. 317; 1 Turn. & V.

(*a*) Hind. 432

(*b*) Lawrence v Richmond, 1 Jac. & W. 241. Donne v. Lewis. 11 Ves. 601.

(*c*) 1 Dick. 371.

(*d*) 1 & 2 Vict. 110, s. 18

Entering.

enter the same particulars in a book, in alphabetical order, by the name of the person whose estate is intended to be affected by such decree or order, and is to be entitled, for every such entry, to the sum of five shillings (*e*); all persons are to be at liberty to search the same book, on payment of the sum of one shilling.'

Sect. IV.

Inrolment of Decrees.

Inrolment necessary to mak decree a record,

A decree does not, strictly speaking, become a record of the Court until it has been inrolled, and, although the Court itself, after it has been duly passed and entered, treats it as a foundation for ulterior proceedings, it is not considered of a sufficiently permanent nature to entitle it in other Courts to the same attention that is paid by one Court of Record to the records of other Courts of the same nature.

until inrolled decree may be altered upon rehearing,

In fact till a decree has been inrolled, and thereby become a record, it is liable to be altered by the Court itself upon a rehearing; whilst a decree, which has been inrolled, is not susceptible of alteration except in a Court of Appeal or by Bill of Review For this reason it is that a decree, which has not been inrolled, although it is in its nature a final decree, is considered merely as interlocutory, and cannot be pleaded in bar to another suit for the same matter (*a*). The advantage, therefore, to be obtained by the inrolment of a decree is to prevent its being the subject of a rehearing and to enable the party benefited by it to plead it in bar to any new Bill which may be filed against him for any of the matters embraced by the Bill upon which the decree is founded.

—and is considered as interlocutory,

—and cannot be pleaded in bar.

Inrolment not necessary before appeal to House of Lords.

It is to be hoped that it will not be considered unimportant to notice, in this place, a notion which appears to be very currently entertained, that the inrolment of a decree of the Court of Chancery is necessary before an appeal against it can be

(*e*) 1 & 2 Vict. 110, sect 19.

(*a*) Ante, 638 n.

In what cases.

carried up to the House of Lords, a notion which appears to have acquired strength from a *dictum* of Lord Brougham, in *Parker* v. *Downing* (*b*), in which his Lordship expresses himself as if he considered, that if the practice of inrolling interlocutory decrees for an account were to be held incorrect (*c*), the effect of such a doctrine would necessarily be to preclude an appeal to the House of Lords, in any case where an account had been decreed, and where the decree, supposing there was nothing else in it, was disputed by the party against whom it was made (*d*). It is, however, with the greatest deference that the Author ventures to suggest that the notion, that in order to entitle a party to appeal to the House of Lords from a decree of the Court of Chancery, previous enrolment of the decree is necessary, is erroneous and originates in a mistake.

Difference between appeals and writs of error.

It is to be observed, that a material difference exists with regard to the method of appealing to the House of Lords from the decisions of Courts of Equity, from that which is the practice in cases of appeal from the decisions of the ordinary jurisdictions. In the latter case the appeal is commenced by writ of error, which is the King's writ, commanding the record itself to be brought into the House of Lords in order that it may be inspected, and that the errors assigned, if any be found to exist, may be corrected there; and it is only upon the production of the record itself, that the House of Lords acquires authority in that particular suit.

Appeals commenced by petition.

In the case of appeals from the Court of Chancery, however, the proceeding in the House of Lords is commenced by a petition from the party conceiving himself to be aggrieved, to the Lords spiritual and temporal in Parliament assembled, setting forth the proceedings below, and praying such redress as the circumstances of the case require. This petition must be answered by the respondent, who generally admits the proceedings below, as stated in the petition, but refers to them when produced, &c; and it is upon the documents below, as set out and admitted in these proceedings, *and not upon the record itself*,

(*b*) 1 M. & K. 634.

(*c*) Vide Staunton v. Oldham, 2 Atk. 383.

(*d*) Parker v. Downing, ubi supra.

In what cases.

Inrolment of decrees for the purposes of appeal.

Only necessary where decision has been by Master of the Rolls or Vice-Chancellor.

that the House proceeds in hearing the appeal. It is true that the process of inrolling decrees of the Court is very frequently resorted to for the purpose of giving jurisdiction to the House of Lords, but that is only where the decree appealed from has been pronounced by a subordinate Judge, viz., the Master of the Rolls or the Vice-Chancellor (*e*); in such cases, no appeal can be directed to the House of Lords without the intermediate process of a rehearing before the Lord Chancellor, because the House of Lords will not entertain an appeal from the decision of a subordinate Judge. In order, therefore, to bring the case before the House of Lords at once, the practice is frequently resorted to *of inrolling the decree*, because, after inrolment, a decree is no longer in a state to be reheard, and the Lord Chancellor, (whose signature as well as that of the inferior Judge, is, as we shall presently see, necessary before the decree can be inrolled,) by signing the decree, has adopted it as his own, and rendered it the act of the supreme Judge of the Court. This course of proceeding has, of late years, been very frequently resorted to, and hence has arisen the mistake of supposing that in all cases of appeals from the decrees of the Court of Chancery the proceedings must be inrolled, whereas in fact, it is only in those particular cases in which it is wished to appeal at once to the House of Lords, without the necessity of having the case reheard before the Lord Chancellor, that such a course is necessary.

In what cases decrees to account ought not to be inrolled.

From what has been said, therefore, it follows that one of the grounds upon which Lord Brougham decided in *Parker* v. *Downing*(*f*), namely, that if the inrolment of the decree of the description of that in *Parker* v. *Downing* were not permitted, there would be no appeal to Parliament, has failed, so that the principle question in dispute in the case is in the same position that it was in previously to that determination. That question was, whether a mere decree to account is one which can be inrolled. The only case which is to be found in the books, in which this point has been directly involved, prior to

(*e*) Conyngham v. Conyngham, 1 Amb. 91; Barlow v. Bateman, 2 Bro. P. C. 272, ed. Tomlins.

(*f*) 1 M. & K. 634.

To account.

Parker v. *Downing*, is that of *Staunton* v. *Oldham* (*g*), in which Lord Hardwicke is reported to have said, that the Court, where there is such a decree, never suffers it to be signed and inrolled, and to have given as his reason for the *dictum*, 'that it ties up their hands if there should have been any defect in the directions of the decree, from relieving in that particular; and defects are very frequent in cases of this nature, and therefore the decrees are left open in order to give parties an opportunity to rehear where the directions in the decree are imperfect;' and it certainly appears to the Author of this Treatise, that the reasons given by that eminent Judge affords strong ground for believing the practice of the Court to be as he has stated it. It has, however, been remarked (*h*), that, in another case before the same learned Judge, his Lordship does not appear to have considered the proposition stated by him in *Staunton* v. *Oldham* to be the rule of the Court, as in his observations upon the practice, in *Wright* v. *Wright* (*i*), where the inrolment was vacated on account of special circumstances, amounting to catching an advantage by too great despatch, no reliance was placed upon the circumstance that the decree was one for an account, which would itself have been decisive had the rule been such as is supposed to be laid down in *Staunton* v. *Oldham* (*k*). But it is to be remarked that, in *Wright* v. *Wright* (*l*), the Bill was filed to redeem a mortgage, and that consequently a decree for an account would have been in effect a declaration of the plaintiff's right to redeem, which was the only question in the cause, a decree of that nature was, therefore, in effect a final decree, and the account merely consequent upon that declaration; which is a different case from that of a decree merely to account, where the declaration of the rights of the parties is the result of the account; as in the ordinary cases of account of the personal estate of persons deceased; where the Court always directs the accounts to be taken before it makes any decree as to the rights of the parties. The same observation will apply to

(*g*) 2 Atk. 383

(*h*) 1 M. & K. 636

(*i*) Reported 1 Ves. 326, as anon., but afterwards, ib. 409 sub nomine, Wright v. Wright, vid Belt's Supp. 158.

(*k*) 2 Atk. 383.

(*l*) Ubi supra.

To account:

Charman v. *Charman* (m), which has been relied upon as shewing that the practice of the Court is not as stated by Lord Hardwicke; there, as in *Wright* v. *Wright*, the account was only consequent upon the right declared to exist in the plaintiff.

Where the account is preliminary to a decision of the right.

On the whole, therefore, it appears to the Author that the question whether a decree to account can, according to the practice, be inrolled or not, must depend upon the nature of the decree; if it is a decree directing an account merely as preliminary to a decision upon the rights of the parties, it would seem, upon the authority of *Staunton* v. *Oldham*, before referred to, to be one which is not capable of inrolment, but if, on the other hand, the direction to account is either in itself a

Secus where the direction to account amounts to a declaration of right or is consequent upon one.

declaration of the rights of the parties or is consequent upon such a declaration, then it appears to be consistent with justice and common sense, that the party benefited by the decree should have it in his power to inrol it; for it is in fact a final decision of the question, as far as it affects that party, the subsequent account being merely the machinery set in motion by the Court for rendering such decision available.

All final decrees may be inrolled,

From what has been said, it may be collected, that all decrees which are final in their nature, i. e., which amount to a determination of the question in the cause, may be inrolled; and the same rule will apply to all decretal orders where they are conclusive

—or decretal orders.

of any of the rights of the parties to the cause (n), but mere interlocutory orders, made upon motion or petition, which do not decide any of the merits of the cause, and only relate to the proceedings in it, cannot be the subject of an inrolment. And it is to be recollected that decrees which, although final in their nature, require a further order of the Court to complete them, such as decrees to foreclose or redeem mortgages or decrees nisi, must be perfected before they can be inrolled.

A decree may be inrolled by a defendant, as well as by a

(m) 14 Ves. 580; 16 Ves. 115.

(n) Vide Earl of Winchilsea v. Garetty, 1 M. & K. 253 from which it appears that several orders, made by the Master of the Rolls upon exceptions to the Master's report and upon petitions to confirm the reports, &c., were successively appealed from to the House of Lords, without an intermediate rehearing, to effect which they must have been previously inrolled.

plaintiff, and it may be done at any time, and notwithstanding an abatement of the suit (*n*). Thus where a decree was made in a cause and cross cause, but was not signed or inrolled till after the death of a party who was plaintiff in the first cause and a defendant in the cross cause—upon a petition being presented to vacate the inrolment, on the ground of its having been made pending the abatement, it was referred to a Master to see whether the signing and inrolling had been regular, who certified his opinion to be that the decree was not properly signed and inrolled; but Lord Hardwicke, upon exceptions to the Master's certificate, entertained a different opinion and allowed the exception (*o*).

By whom

Decrees may be inrolled by defendant as well as by plaintiff, —notwithstanding an abatement of the suit.

By a general order of the Court, all decrees and dismissions, pronounced upon hearing the cause, are to be drawn up, signed, and inrolled, before the first day after the next Michaelmas or Easter Term after the same shall be so pronounced respectively, and not at any time after, without special leave of the Court (*p*). This leave, however, will be granted at any time, and, in order to obtain it, a motion must be made or petition presented at the Rolls praying that the decree may be inrolled *nunc pro tunc*, upon which an order will be made as a matter of course.

Within what time.

Nunc pro tunc.

Order for—of course.

In *Sheffield* v. *The Duchess of Buckingham* (*q*), which has been before referred to, the order for inrolling the decree *nunc pro tunc* was made in two causes, in one of which a Duke of Buckingham, who was dead, was mentioned to be plaintiff and in the other defendant, and before the suit was revived, and yet it was held by Lord Hardwicke to be regular (*r*). The order for inrolling the decree *nunc pro tunc* being drawn up, passed, and entered, at the Registrar's Office in the usual manner (*s*), is to be left with the Clerk in Court for the party in-

—may be made notwithstanding abatement.

Must be drawn up and passed,

—and served upon Clerk in Court inrolling.

(*n*) Gartside v. Isherwood, 2 Dick. 612; Carrington v. Holly, cited ibid.

(*o*) Sheffield v. Duchess of Buckingham, West. Rep. 673. Amb. 586. S. C.

(*p*) Beames's Ord. 206.

(*q*) Ubi supra.

(*r*) Sed vide Bertie v. Lord Falkland, 1 Dick. 25.

(*s*) Harr. Ch. Pr. (8th ed. vol. 1, 442,) referring to L. C. B. Gilbert, says, that the order ought to be passed and entered with the Registrar, and adds, that though this is never done yet a case may fall out where it may be of fatal consequence to the

Docket.

rolling the decree (*s*). The Clerk in Court then draws up the form of the decree for inrolment, reciting therein all the pleadings, orders, and material proceedings in the causes, for which purpose the Solicitor leaves with him all the necessary proceedings requiring inrolment. These being put into the proper form, language, and order, are engrossed upon paper, and the paper upon which the inrolment is so made is called the docket (*t*).

Docket—what.

—must be signed by the Judge,

The next process is to present the docket to the Judge who pronounced the decree, for his signature. If the decree was pronounced by the Lord Chancellor, it may be presented to him at once; but if by the Master of the Rolls or Vice-Chancellor, his signature must be procured before it is presented to the Lord Chancellor. Previously, however, to its being presented to either of the Judges, the Six Clerk for the party inrolling the decree must, by himself or his deputy, examine the docket with the several pleadings, orders of Court, &c., therein mentioned, and must write a memorandum of his having so done, in the nature of a certificate, at the foot of the last sheet of the docket, to the effect that the docket agrees with the several pleadings, orders, and other proceedings, therein recited, and has been examined by the Six Clerk or his deputy; and here it may be observed, that, in preparing a docket for inrolment, the pleadings ought to be taken from the original pleadings upon record, and not from the Registrar's recitals in the decree (*u*). The memorandum or certificate being prepared must be signed by the Six Clerk, or his deputy, in case of his absence from town or illness (*x*). This is required by the General Orders of the Court (*y*), which direct, that no decree or dismission shall be presented to the Lord Chancellor, Lord Keeper, or Master of the Rolls, before it be signed by that

—but must previously be examined by Clerk in Court,

—who must certify that he has done so.

party; and, strictly speaking, it is certainly irregular to present the docket to the Lord Chancellor to be signed before the order has been so passed and entered. Per Lord Eldon, in Robinson v. Newdick, 3 Mer. 14.

(*s*) It appears not to be the practice to serve this order upon the adverse Clerk in Court, though from the form of the order, as given in Hands' Solicitor's Assistant, 239, directing notice thereof to be given forthwith, it might be inferred that such service was necessary.

(*t*) Hind. 442.

(*u*) For. Rom. 210.

(*x*) Hind. 443.

(*y*) Beames's Ord. 206; ib. 112, vide etiam, 242.

Six Clerk to whom it belongeth of his proper handwriting, or by his deputy in his absence.

Docket.

The docket, thus authenticated by the proper officer, is left by the Clerk in Court with the Bag-bearer of the Six Clerks' Office, who, if the Cause has been heard by the Lord Chancellor himself or by the Vice-Chancellor, will leave the docket with the Lord Chancellor's Secretary of decrees and injunctions, which Officer will procure the Lord Chancellor's signature to it, having previously, if the cause has been heard by the Vice-Chancellor, procured that of his Honor. If the cause has been heard by the Master of the Rolls, the docket is first left with the Master of the Rolls's Secretary of decrees and injunctions, for the Master of the Rolls's signature, after which it is taken to the Lord Chancellor's Secretary of decrees and injunctions, for his Lordship's signature (*z*). And it is to be observed that, whether the cause was heard before the Lord Chancellor, or by the Master of the Rolls (*a*), or Vice-Chancellor (*b*), whoever may have heard the cause, it is the Lord Chancellor's decree, and must be signed by him before it is inrolled (*c*).

Signature of Lord Chancellor, —or of Vice-Chancellor, —or Master of the Rolls;

Docket must be signed by the Lord Chancellor;

In strictness the docket ought not to be presented for signature until the order for leave to inrol the decree *nunc pro tunc* has been passed and entered (*d*).

—but not till order *nunc pro tunc* has been entered.

The docket having been signed by the Lord Chancellor, the day and year when it was signed must be written at the foot of the docket, near the signature of the Lord Chancellor, after which the Clerk in Court inrolling the decree, engrosses an exact copy thereof, upon parchment rolls, and carefully examines them with the docket, which, together with the parchment rolls, is carried by the Clerk in Court into the Record Room of the Six Clerks' Office, and deposited with the Record Keeper for safe custody. The inrolment is then complete, and a decree thus inrolled is pleadable, and cannot be reversed but by appeal to the House of Lords or by bill of review (*e*).

Date of inrolment.

Copy upon parchment.

Where deposited.

As the effect of inrolling a decree is to render it final and to

How prevented.

(*z*) Hind. 443.
(*a*) 3 Geo. 2, c. 30.
(*b*) 53 Geo. 3, c. 24.
(*c*) Hind. 443.
(*d*) Robinson v. Newdick, 3 Mer. 13.
(*e*) Hind. 444.

How prevented. deprive the party against whom it is pronounced of all opportunity of having it corrected by a rehearing in the Court itself, such party, if he is dissatisfied with the decision, and wishes to have it reheard, either before the Judge who pronounced it or before the Lord Chancellor, by way of appeal, must take the proper precautions to prevent the inrolment; the first step to which is that of entering a *caveat* against the inrolment with the proper officer.

Caveat,

where entered. A *caveat* is entered with the Lord Chancellor's or Master of the Rolls's Secretary of decrees and injunctions, by leaving a note, in the following form, with the Bag-bearer of the Six Clerk's Office:—

Form of. IN CHANCERY.

John Doe........plaintiff,
and
William Styles..defendant.

Decree made by his Lordship, [or by his Honor the Vice-Chancellor, or Master of the Rolls,] *dated the* 31*st day of January*, 1839.

Enter a Caveat against inrolling this Decree.

A. B. Clerk,
28*th of September*, 1839.

Prevents signing for 28 days, The effect of this *caveat* is to prevent the signing of the decree, previous to its inrolment, for 28 days, to be accounted from the time of the docket being presented to the great seal to be signed (*f*), or from the time of notice, of the docket having been presented for signature, being given to the other side by the Lord Chancellor's Secretary, whose duty it is to give such notice immediately on the decree being so presented (*g*). These 28 days must be clear days (*h*), and service, of notice of the docket having been presented, on the Clerk in Court is good service (*i*).

which must be clear days.

No time limited for entry of caveat; No period appears to be limited, by the practice of the Court, within which a *caveat* may be entered; but a party dissatis-

(*f*) Beames's Ord. 309.
(*g*) Burnet v. Theobald, 1 P. Wms. 610.
(*h*) Robinson v. Newdick, 3 Mer. 13.
(*i*) Ibid.

fied with the decision of the Court, should lose no time, after the decree has been passed and entered, in entering his *caveat*, to prevent the other party from inrolling the decree. The *caveat*, however, will be in time, if entered at any time before the docket has been delivered to the Lord Chancellor's Secretary, for his Lordship's signature. It is to be observed, that it is the delivery of the docket, to the Lord Chancellor's Secretary, which completes the inrolment; and that a *caveat*, entered after that has taken place, will be useless, even though the signature should not be actually affixed at the time of its entry. Thus, where the docket had been delivered by the Bag-bearer, into the hands of the Lord Chancellor's Secretary of decrees, for the purpose of being submitted to the Lord Chancellor for signature, and the Secretary had despatched it to Brighton, where his Lordship was residing; and in the evening of the same day, and before the signature had been actually affixed, a *caveat* was tendered at the office, but refused, as coming too late; the Lord Chancellor, (Lord Lyndhurst,) upon a motion to vacate the inrolment, after consulting the Six Clerks, was of opinion that the *caveat* was not in time (*k*). It is to be observed, however, that, in a case before Lord Hardwicke (*l*), a *caveat* was held to have been in time, which was entered after the docket had been tendered to the Lord Chancellor for signature; but it is to be remarked that the plaintiff, in that case, in order to prevent an appeal, had hurried on the inrolment, so as to have it ready for signature within two days after the decree had been passed, and that it was presented for signature before eleven o'clock on the second day, before which time the *caveat* would have been entered, had it not been for the mistake of the party, who applied to do it at the wrong office;—as it was, the *caveat* was entered before eleven o'clock on the same day, although not before the docket had been left for signature; and Lord Hardwicke was, therefore, of opinion, that the plaintiff had been too quick in his proceedings, and that the case came within the reason of the Common Law Courts, for setting aside judg-

How prevented.

—but must be before docket has been delivered to Lord Chancellor's Secretary,

—which completes the inrolment,

—although not actually signed till afterwards.

(*k*) Barnes v. Wilson, 1 R. & M. 486.

(*l*) Anon. 1 Ves. 326.

How prevented

ments on the ground of surprise, although they are strictly regular (*m*).

Petition for rehearing,

—must be presented within 28 days from *caveat*.

It has been before stated, that the effect of a *caveat* is to suspend the inrolment of the decree or order for 28 clear days, from the time of the docket being presented to the Lord Chancellor for signature, and from notice of such presentation being served upon the opposite party; therefore, if the opposite party wishes to benefit by his *caveat*, he must take care to present his petition for a rehearing within that time, otherwise the inrolment may be perfected. It seems, however, that if the petition for a rehearing be actually presented to the Lord Chancellor within the limited time, it will be sufficient, although it be not answered, nor the order drawn up till after it has expired (*n*).

Inrolment vacated for irregularity.

If any irregularity has occurred in the inrolment of a decree or order, or in the proceedings to accomplish that object, the Court will, upon application by motion (*o*), order it to be vacated; thus, in the case last referred to, where the inrolment was completed after a *caveat* and the presentation of a petition of appeal, but before it was signed or the order for a rehearing made, the Court directed it to be vacated; and so it will be, as we have seen, if done after a *caveat*, and before the 28 days have expired, although no petition of appeal has been presented (*p*). In *Parker* v. *Downing* (*q*), an inrolment was vacated by Lord Brougham, because the order to inrol it *nunc pro tunc* was irregular, by reason of the petition upon which it was made not setting forth the date of the decree.

Upon discretionary grounds.

It seems, also, that where the case has not been heard upon its merits, the Court will exercise a discretionary power of vacating an inrolment, and of giving the party an opportunity of having the merits of his case discussed; thus, where a decree of dismissal was made by default, owing to the neglect of

(*m*) Anon. 1 Ves. 326; vide Belt's Supplement, 158.

(*n*) Richards v. Wood, 3 M. & K. 621.

(*o*) Or petition, vide Pickett v. Loggon, 5 Ves. 702.

(*p*) Barnes v. Wilson, 1 R. & M. 486.

(*q*) 1 M. & K. 634; Robinson v. Newdick, 3 Mer. 13.

the plaintiff's Solicitor, in providing Counsel to attend at the hearing (*r*). So, in *Benson* v. *Vernon* (*s*), where a Bill had been taken *pro confesso*, for want of an answer, and it was proved that the defendant was in an unsound state of mind, and had omitted, from that circumstance, to put in an answer, the House of Lords ordered the inrolment of the decree to be vacated. The same principle was also acted upon by Lord Hardwicke, in *Kemp* v. *Squire* (*t*), who said that the above cases proved it to be discretionary in the Court, (he did not mean it arbitrarily so,) to exercise the power if it sees fit. In *Pickett* v. *Loggon* (*u*), however, the Court refused to act upon this discretion, and it is to be observed, that, in all those cases where it has been exercised, the merits of the cause had not been discussed before the decree was pronounced; and that, where such has been the case, the Court has refused to exercise the discretionary power before alluded to (*x*), unless there has been something in the nature of a surprise upon the party affected, as in the anonymous case which has been before referred to (*y*); or in *Stevens* v. *Guppy* (*z*), where the inrolment of a decree was set aside, because made a few days after a conversation had taken place, between the Solicitor for the plaintiff and the Solicitor for the defendant, in which the former had informed the latter, that a petition for a rehearing was preparing, to which the latter answered by desiring that no time might be lost in preparing it. In that case, Lord Eldon laid down the rule, 'that if the party inrolling the decree, has said that which might lead the other party to believe that the decree would not be inrolled, it is a surprise.' It is, however, to be remarked, that it is not every expression that may lead the party to entertain expectations that the decree will not be inrolled, which will induce the Court to vacate an inrolment; in order to establish such a case, there must be a certain degree of *mala fides* on the part of the party inrolling, which may have mis-

Of vacating the inrolment.

Not where cause has been heard upon merit;

—unless there has been a surprise.

What amounts to surprise.

Mala fides

(*r*) Robson v. Cranwel; cited 1 Ves. 205.
(*s*) Cited, ibid. 206.
(*t*) 1 Ves. 205.
(*u*) 5 Ves. 702.
(*x*) Charman v. Charman, 16 Ves. 115.
(*y*) 1 Ves. 326.
(*z*) 1 Turn. & R. 178; vide etiam Parker v. Dee, 2 Cha. Ca. 200; 1 Rep. temp. Finch. 123; 3 Swanst. 529; Anon. 1 Vern. 131.

Of vacating the inrolment.

led the party complaining; therefore, it was held, by Lord Brougham, in *Balguy* v. *Chorley* (*a*), that the mere circumstance of its having been intimated, on the part of the defendant to the plaintiff's Solicitor, that it was the intention of the defendant to appeal forthwith, and of the plaintiff's Solicitor saying in answer, that he was open to any fair offer of arrangement to prevent the necessity of an appeal, did not amount to such a surprise as will induce the Court to vacate the inrolment. This is in accordance with what was laid down by Lord Lyndhurst, in *Barnes* v. *Wilson* (*b*), where his Lordship held, that a party was not bound to communicate his intention to inrol a decree, to his adversary, because the latter informs him of his intention to appeal against it (*c*).

After a decree has been inrolled, it can only be altered on a Bill of review (*d*), or by an appeal to the House of Lords; and this, though the decree has been inrolled by one of several defendants (*e*). In some cases, however, the Court, as we shall see in the next section, will permit clerical errors and miscastings to be rectified, upon motion, soon after inrolment.

Sect. V.

Of Rectifying Decrees.

After they have been passed and entered.

We have seen before (*f*), that as long as the decree remains in the shape of minutes, that is, till it has been passed and signed by the Registrar, it may be rectified upon application to the Court, by petition or motion, or by having it put into the cause paper, '*to be spoken to,*' and that, even important matters may be brought before the Court, upon an application

(*a*) 1 M. & K. 640.

(*b*) 1 R. & M. 486.

(*c*) For the method of exemplifying decrees after inrolment, vide Harr. Ch. Pr. (Ed. Newl.) 336.

(*d*) Harr. 323; ib. 348.

(*e*) Gore v. Pardon, 1 Sch. & Lef. 234.

(*f*) Ante, p. 668.

to vary minutes; but, after a decree has been passed and entered, the Court will not entertain any application to vary it, unless upon consent of all parties, or in respect of matters which are quite of course. The proper method of having a decree rectified in other matters, is by applying to have the cause reheard (*b*).

After they have been passed and entered.

In cases, however, in which a clerical error has crept into the decree, or in which some ordinary direction has been omitted, the Court will entertain applications to rectify it, even though it has been passed and entered; and so, where the decree omitted the usual directions for the parties to be examined upon interrogatories, &c., Lord Eldon held, that the decree might be corrected by the insertion of the direction (*c*). So where a decree, in a creditor's suit, omitted the usual direction to take an account of the personal estate, his Lordship ordered it to be inserted, even though the decree had not been pronounced by himself, but by the Master of the Rolls (*d*).

To rectify clerical errors, &c.,

—or the omission of usual directions.

It is, nevertheless, to be observed, that it is a principle of the Court, that no alteration can be made in a decree on motion without a rehearing, except in a matter of clerical error or of form, or where the matter to be inserted is clearly consequential on the directions already given. Upon this ground, where the decree directed a commission to ascertain the boundaries of prebendal lands, a motion, that the decree might be extended to copyhold as well as to freehold lands, which was opposed, was refused (*e*). So where an ejectment was ordered to be brought, without restraining the defendant from setting up an outstanding term, the introduction of such a restraint was not permitted (*f*). In *Colman* v. *Sarell* (*g*), Lord Thurlow would not allow a decree to be varied, by giving costs

Secus where such directions are not consequential upon the relief;

(*b*) 2 Harr. 322; vide post, rehearings and appeals.

(*c*) Wallis v. Thomas, 7 Ves 292.

(*d*) Pickard v. Mattheson, 7 Ves. 293; vide etiam Newhouse v. Mitford, 12 Ves. 456; Lane v. Hobbs, ib. 458; Skrymsher v. Northcote, 1 Swanst. 573, n.; Tomlins v. Palk, 1 Russ. 475; Hawker v. Buncombe, 2 Mad. 391.

(*e*) Willis v. Parkinson, 3 Swanst. 233.

(*f*) Brackenbury v. Brackenbury, 2 Jac. & W. 391.

(*g*) 2 Cox. 206.

After Entry.

to a defendant who was a mere trustee, and, as such, would have been entitled to them if they had been asked for at the hearing. And, in *Brookfield* v. *Bradley* (*h*), Sir John Leach declined to correct a decree, in which the error was apparent, because the alteration proposed would require new directions upon the corrected part.

—or where new directions would be necessary upon the corrected part.

Application may be made by motion,

It is to be noticed that, in the two last cases, the application was made by petition, but in *Wallis* v. *Thomas*, *Pickard* v. *Mattheson*, and others which have been referred to, the application was by motion upon notice (*i*). It seems, however, to be doubtful whether in all cases where such an alteration in a decree is required, the application should not be made by petition, for, by the 45th of Lord Lyndhurst's Orders (*k*), it is provided, that clerical mistakes in decrees, or decretal orders arising from any accidental slip or omission, may, at any time before inrolment, be corrected *upon petition* without the expense of a rehearing.

—but semble it ought to be by petition.

Manner of making alterations.

Some difference appears to exist in the manner in which the alterations, permitted by the Court, are to be made in the decree; it may, however, be collected, from what has been said, that where the alteration required is merely the addition of some direction which has been omitted, the omission will be supplied by a separate supplemental order, without altering or interlining the decree (*l*).

By supplemental order.

By alteration of the decree itself.

It seems, however, that in cases of error in the direction of the decree, where the alteration cannot be made by supplemental order, the Court will direct the Registrar to attend with the decree and make the alteration in open Court which the Judge will countersign with his initials (*m*).

In *Hawker* v. *Buncombe* (*n*), the order appears to have been that one of the Registrars might be directed to alter the decree.

Decrees rectified after inrolment.

The Court will, in some cases, extend the indulgence of

(*h*) 2 S. & S. 64.

(*i*) Vide etiam Willis v. Parkinson, 3 Swanst. 233.

(*k*) Ord. 1828. Qy. the necessity of this order?

(*l*) Lane v. Hobbs, 12 Ves. 458; vide etiam Wallis v. Thomas, 7 Ves. 292.

(*m*) Tomlins v. Palk, 1 Russ. 476; vide etiam Skrymsher v. Northcote, 1 Swanst. 573 n.

(*n*) 2 Mad. 391.

rectifying decrees in which there have been clerical mistakes, to decrees which have been actually inrolled. Thus in cases of miscasting, where the matter demonstratively appears upon the decree itself to have been mistaken, it may be explained and rectified by order (*o*); so, likewise, if some part of the decree be omitted in the inrolment, it may be inserted upon motion to the Court. It is to be observed, that under the denomination of miscasting is not to be included any pretended miscasting or misvaluing, but only error in auditing and numbering (*p*).

After Inrolment.

Where error demonstratively appears.

Miscasting.

In *Weston* v. *Haggerston* (*q*), Lord Eldon held that all errors on the face of the schedules could be rectified even after inrolment, but that there could be no correction except of such apparent errors; and he, therefore, held, that no affidavit introducing a new fact, after inrolment, could be permitted. In *Yow* v. *Townsend* (*r*), where the Master had made a mistake in his report, directing a sum of money to be paid to two defendants, whereas he was ordered by the decree to direct the payment of it to one only, the Court ordered the docketing of the inrolment to be altered accordingly. In *Spearing* v. *Lynn* (*s*) leave was given to amend the title of an order which appears to have been inrolled, although the effect of the alteration was to charge a surety who had been sued at law under the order, and, relying upon the mistake in the title of the order, had pleaded that there was no such order.

On the face of schedules.

Title of an order amended after inrolment.

Sect. VI.

Effect of Stat. 1 & 2 *Vict.* c. 110.

Before we proceed to point out the means which the practice of the Court furnishes to enforce the execution of its decrees and orders, by those who are bound to obey them, it is

Effect of decrees under the old law.

(*o*) For. Rom. 184; Beames's Ord. 3.
(*p*) Beames's Ord. 3.
(*q*) Coop. Rep. 134.
(*r*) 1 Dick. 59.
(*s*) 2 Vern. 376.

Effect of Decrees under the old law.

necessary to call the reader's attention to certain alterations which have taken place in the law with regard to the effect of decrees in equity upon the property of those who are subjected to their operation.

Decree operates *in personam* only,

Formerly a decree in a Court of Equity, unless it was for the land itself, operated only in *personam:* and the only method of enforcing it was by means of what is termed process of contempt against the party disobeying it, under which the party, if arrested, might be kept in prison till he obeyed.

—and may be enforced by process of contempt, —and sequestration.

It was also competent to the party claiming the benefit of the decree, where the contemnor either could not be arrested upon the process, or, having been arrested, remained in prison without paying obedience to the Court, to issue a writ of sequestration directing the Commissioners, therein named, to sequester the personal property of the defendant, and the rents and profits of his real estates, and to keep him from the enjoyment of them, till he has cleared his contempt, in the same manner as in the case of a defendant who had committed a contempt by not appearing and answering the Bill. Originally this process was merely used as a means of coercing the defendant, by keeping him out of possession of his property; and the practice of applying the money received by the sequestrators, in satisfaction of the sum decreed to be paid, is of comparatively modern origin (*a*). This, however, as we shall see in the next section, has become the usual course of proceeding, and the Court will now, where a sequestration has been issued to enforce a decree for the payment of money, order the sequestrators to apply what they have received, by virtue of the sequestration, in satisfaction of the duty to be performed. Still, however, this is only a personal proceeding, and does not alter the nature of the decree, which, being *in personam,* abates by the death of the individual charged, and does not affect his property further than by enabling the party claiming the benefit of it to come in *pari passu* with the other creditors, against the personal estate. A sequestration may certainly be revived against the personal representative of the party, but it cannot

Application of property sequestered to pay debts of modern origin.

Defect of proceeding by sequestration.

(*a*) Vide Wharam v. Broughton, 1 Ves. 182.

Effect of Decrees under the old law.

be revived against his heir, unless the real estate is the subject of the suit, so that, after the death of the defendant, the proceeding by sequestration may be a very inefficient means of enforcing the demand, and certainly is not equal in effect to a judgment at law. It is true, as stated by Lord Chief Baron Gilbert (*b*), that 'a decree has the same authority to bind the personal assets as a judgment at law, and, therefore, shall go *pari passu* to be paid off and discharged' (*c*), but as the *lien* of the judgment came in by the Statute of Westminster, 13 Ed. 1, c. 18, which only gives an *elegit* for a moiety of the land, in satisfaction of the debt, therefore, that could give no authority to lay a sequestration on the real estate for a mere personal duty, when the heir is not bound in the covenant (*d*): so that, in cases where the land is not the subject matter of the suit, a decree in equity will not, according to the law as it existed before the 1 & 2 Victoria, c. 110, have the same effect as a judgment at law in binding the real estate. This defect in the law, as regards decrees in equity, has, however, been remedied by the above Statute (*e*), which has provided, 'that all decrees and orders of Courts of Equity, and all rules of Courts of Common Law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, shall have the effect of judgments in the superior Courts of Common Law; and the persons to whom any such monies or costs charges, or expenses, shall be payable, shall be deemed judgment creditors, within the meaning of the said Act.'

Remedied by 1 & 2 Vict. c. 110, s. 18.

It is also enacted, that all powers thereby given to the Judges of the superior Courts of Common Law, with respect to matters depending in the same Courts, shall and may be exercised by

(*b*) For. Rom. 87.
(*c*) Morrice v. Bank of England, Ca. Temp. Talb. 217; 3 P. Wms. 401 n. S. C.; 3 Swant. 573, S. C.; Martin v. Martin, 1 Ves. 214; Joseph v. Mott, Prec. in Chan. 79; Bishop v Godfrey, ib. 179; Searle v. Lane, 2 Vern. 37, 88; 2 Freem. 103, S. C.; Grey v. Chiswell, 9 Ves. 125.
(*d*) Vide Bligh v. Earl Darnley, 2 P. Wms. 621; Astley v. Powis, 1 Ves. 496; Mildred v. Robinson, 19 Ves. 588.
(*e*) Sect. 18.

Effect of Decrees under the Statute.



Courts of Equity with respect to matters therein depending, and by the Lord Chancellor, and by the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies thereby given to judgment creditors, are in like manner given to persons to whom any monies or costs, charges, or expenses, are by such orders or rules respectively directed to be paid.

Effect of a decree under the statute

—upon real estate;

—by virtue of the writ of *elegit.*

The effect of the above statute is to give to decrees in Courts of Equity, provided they have been registered in the manner directed by the Act (*f*), the same effect as the same statute gives to judgments at Law. And here it is to be observed, that the Act gives a much larger effect to judgments at law, and, by consequence, to decrees or orders in Equity, than they before enjoyed; for, by the 11th section, which expressly recites that '*the existing law is defective, in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors,*' and '*that it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law,*' it is enacted, that it shall be lawful for the Sheriff, or other officer to whom any writ of *elegit*, or any precept in pursuance thereof, shall be directed, at the suit of any person, upon any judgment, which at the time appointed for the commencement of the Act shall have been recovered, or shall be thereafter recovered in any action, in any of her Majesty's Superior Courts at *Westminster*, to make and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of, at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, in like manner as the Sheriff or other officer may now make and deliver execu-

Sheriff may deliver to creditor, possession of all lands, &c., —freehold or copyhold, —of which debtor is seised, &c., —at the time of entering up judgment, —or afterwards, —or of which he has a disposing power.

(*f*) Ante, p. 673.

tion of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the Court, out of which such execution shall have been sued out, as a tenant by *elegit* is now subject to in a Court of Equity: and that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable, and is thereby required to make, perform, and render to the lord of the manor, or other person entitled, all such and the like payments and services as the person against whom such execution shall be issued, would have been bound to make, perform, and render, in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same, until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied; and it is also provided, that, as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of the said Act, such writ of *elegit* shall have no greater or other effect than a writ of *elegit* would have had in case the said Act had not passed.

Effect of *Elegit*.

—subject to account;

—and in case of copyholds, to rights of Lord.

Purchasers before the Act, excepted out of its operations.

The 12th section also provides, that, by virtue of any writ of *fieri facias* to be sued out of any superior or inferior Court, after the time appointed for the commencement of the said Act, or any precept in pursuance thereof, the Sheriff or other officer having the execution thereof, may and shall seize and take any money or Bank notes, (whether of the Governor and Company of the Bank of England, or of any other Bank or banker,) and any checks, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the person against whose effects such writ of *fieri facias* shall be sued out; and may or shall pay or deliver to the party suing out such execution, any money or Bank notes which shall be so seised, or a sufficient part thereof; and may and

Effect of *fieri facias*,

—to enable Sheriff to seize *choses in action*.

Effect of *fieri facias*

shall hold any such checks, bills of exchange, promissory notes, bonds, specialties, or other securities for money, as a security or securities for the amount by such writ of *fieri facias* directed to be levied, or so much thereof as shall not have been otherwise levied and raised, and may sue, in the name of such Sheriff or other officer, for the recovery of the sum or sums secured thereby, if and when the time of paym thereof shall have arrived; and that the payment to such Srts riff or other officer, by the party liable on any such check mer of exchange, promissory note, bond, specialty, or other itute rity, with or without suit, or the recovery and levying e that tion against the party so liable, shall discharge hirw, and, extent of such payment, or of such recovery and hn they becution, as the case may be from his liability ossly recites check, bill of exchange, promissory note, bond, *muate means* other security, and such Sheriff or other officer may *from the* pay over to the party suing out such writ the money *ve judg-* recovered, or such part thereof as shall be sufficient *id per-* charge the amount by such writ directed to be levied *e exist-* after satisfaction of the amount so to be levied, togetleriff, or Sheriff's poundage and expenses, any surplus shall remit in pur- hands of such Sheriff or other officer, the same shall ly person, the party against whom such writ shall be so issued. the com- vided, however, that no such Sheriff or other offic or shall bound to sue any party liable upon any such check her Ma- change, promissory note, bond, specialty, or other and deliver less the party suing out such execution shall enter such lands, with two sufficient sureties, for indemnifying him ents, includ- and expenses to be incurred in the prosecution of mary tenure, or to which he may become liable in consequence or any per- expense of such bond to be deducted out of any mo ssed of, recovered in such action ime

Sheriff not bound to sue, —unless party issuing *fi fa* shall give security by bond, &c.

Judgments to be a direct charge upon real estates.

The 13th section of the Act, (which is framed for the express purpose of giving to judgments the effect of express charges upon real estates,) enacts that a judgment already entered up, or to be thereafter entered up, against any person in any of her Majesty's superior Courts at Westminster, shall operate as a charge upon all lands, tenements, rectories, advowsons,

tithes, rents, and hereditaments, (including lands and hereditaments of copyhold or customary tenure,) of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled, for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom such judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest, in or out of any of the said lands, tenements, rectories, advowsons, rents, and hereditaments.

Effect of Decree upon real Estate.

It is provided, also, by the same section, that every judgment creditor shall have such and the same remedies, in a Court of equity, against the hereditaments so charged by virtue of the said Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been entered up, had power to charge the same hereditaments, and had by writing under his hand, agreed to charge the same with the amount of such judgment debt and interest thereon: but that no judgment creditor shall be entitled to proceed in equity, to obtain the benefit of such charge, until after the expiration of one year from the time of entering up such judgment; or, in cases of judgments already entered up, before the time appointed for the commencement of the said Act, until after the expiration of one year from the time appointed for the commencement of the said Act, and that no such charge shall operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy: and also, that, as regards purchasers, mortgagees, or creditors who shall have become such

Judgment creditors to have same remedies in equity as parties having direct charges;

but not to have benefit till one year after judgment entered up;

nor in cases of bankruptcy unless entered up twelve months before the bankruptcy.

Effect of Decrees upon real Estates.

before the time appointed for the commencement of the said act, such judgment shall not affect lands, tenements, or hereditaments, otherwise than as the same would have been affected by such judgment if the said Act had not passed. It is also provided that nothing therein contained shall be deemed or taken to alter or affect any doctrine of Courts of Equity whereby protection is given to purchasers for valuable consideration without notice.

Method of charging stock in the public funds or in public companies with judgment debt;

In order to render the operation of a judgment effective against any stock, which the person bound by it may have in the public funds or in any public company, and to prevent the transfer of such stock before the necessary steps can be taken for that purpose, the 14th section enacts, that if any person against whom any judgment shall have been entered up in any of her Majesty's superior Courts at Westminster, shall have any government stock, funds, or annuities, or any stock or shares of or in any public company in England, (whether incorporated or not,) standing in his own name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge of one of the superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them, or such part thereof, respectively, as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered and interest thereon; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor. It is to be noticed, that the same section directs, that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order; but in order to prevent any person against whom judgment shall have been obtained, from transferring, receiving, or disposing of any stock, funds, annuities, or shares, thereby authorized to be charged for the benefit of the judgment creditor under an order of a Judge, it is enacted (*a*), that every order of a Judge, charging any government stock, funds, or annuities, or any stock or shares in any public company, under the said Act,

—by order of Judge.

But not to have effect till six months after the date of such order.

Order *nisi* to be made exparte.

(*a*) Sect. 15.

shall be made, in the first instance, *ex parte*, and without any notice to the judgment debtor, and shall be an order to shew cause only; and such order, if any government stock, funds, or annuities, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and Company of the Bank of England from permitting a transfer of such stock in the meantime, and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer, shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor, in the meantime, shall be valid or effectual as against the judgment creditor; and further, that unless the judgment debtor shall, within a time to be mentioned in such order, shew to a Judge of one of the said superior Courts, sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his Attorney, or agent, be made absolute: and it is also provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, aad to award such costs, upon such application, as he may think fit.

Effect of Decrees upon Stock in the Funds, &c.

—shall restrain governor and company of the Bank,

—or other public company, from making transfer;

—and if Bank or other company shall permit sale or transfer till order *nisi* discharged,

—they shall be liable to the judgment creditor.

Order made absolute on affidavit of service.

Court to have power to discharge or vary order, &c.

It is, however, enacted(*a*), that if any judgment creditor, who, under the powers of that Act, shall have obtained any charge, or be entitled to the benefit of any security, whatsoever, shall

Creditor having obtained charge to forfeit it if he arrest the party.

(*a*) Sect 16.

Effect of Decrees upon stock, &c.

afterwards, and before the property so charged or secured, shall have been converted into money or realized, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, then, and in such case, such judgment creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly.

Judgment debts to carry interest, at the rate of 4 per cent, from the date of judgment,

It is to be observed, that, by the 17th section, that every judgment debt shall carry interest, at the rate of 4*l. per cent per annum*, from the time of entering up the judgment, or from the time of the commencement of the Act, in cases of judgments then entered up and not carrying interest, until the same shall be satisfied; and such interest may be levied under a writ of execution on such judgment.

—which may be levied under a writ of execution.

Sect. VII.

Of Enforcing the Execution of Decrees.

Difference between executions at Law and in Equity.

Until the act of parliament, which has been discussed in the preceeding section, came into operation, the performance of a decree or order of the Court, like the appearance of a party to the *subpœna*, could only be enforced by what is termed process of contempt; in which respect, the proceedings of Courts of Equity differed materially from those of Courts of Law, where the writs, by which execution of their judgments are compelled, are not founded upon any contempt of the Court, committed by the defendant, but are considered as a means of satisfying the plaintiff. For this reason it is, that, at law, execution cannot be had both against the person and the property of the defendant, but the plaintiff is compelled to elect which he will proceed against.

By *fieri facias* or *elegit* under the new orders.

In equity, however, the case was different; for, till the Orders of the 10th of May, 1839(*a*), were promulgated, the process for enforcing obedience to decrees and orders of the Court, was, in all cases, founded upon contempt. Those Orders have

(*a*) 1 Beavan, Appx.

By Writ under New Orders.

made an important alteration in the law of the Court, in this respect, by providing the forms of writs of *fieri facias, elegit,* and *venditioni exponas,* similar to those adopted by Courts of Law, which a party may resort to for the purpose of obtaining satisfaction of any pecuniary demand, to which he may have succeeded in establishing his right in the Court or Chancery in the same manner that a plaintiff in a Court of Common Law, is empowered to sue out execution upon a judgment there entered up.

These writs are devised, pursuant to the direction of the statute 1 & 2 Vict. c. 110, (for abolishing arrest on mesne process, &c.) by which, as we have seen (*a*), the same effect is given to *decrees and orders of Courts of Equity,* &c., provided they are duly entered with the proper officer of the Court of Common Pleas, pursuant to the 19th section, as is given by the Act to judgments in the superior Courts of Common Law.

The 20th section of the Act directs, that such new or altered writs shall be sued out of the Courts of Law, Equity, and Bankruptcy, as may be by such Courts, respectively, deemed necessary or expedient for giving effect to the provisions thereinbefore contained, and in such forms as the Judges of such Courts, respectively, shall, from time to time, think fit to order; and that the execution of such writs shall be enforced in such and the same manner as the execution of writs of execution is now enforced, or as near thereto as the circumstances of the cases will admit, &c.; and it is in pursuance of the authority conferred by this section, that the writs above mentioned have, by the Orders of the 10th of May, 1839, been directed to issue.

The effect of these writs has been mentioned in the preceding section (*b*), and it is therefore merely necessary, in this place, to call the reader's attention to the regulations respecting them, which have been promulgated by the above Orders.

Writs may be sued out within one month from the passing and entering, &c.

By those orders it is provided, 1st, that every person to whom in any cause or matter pending in the Court, any sum of money, or any costs, have been ordered to be paid, shall,

(*a*) Ante, p. 691. (*b*) Ante, p. 692, 693.

By Writ under the New Orders.

after the lapse of *one month from the time when such order for payment was duly passed and entered*, be entitled, by his Clerk in Court, to sue out one or more writ or writs(*c*) of *fieri facias*, or writ or writs of *elegit*, of the form thereinafter stated, or as near thereto as the circumstances of the case may require.

Date of entry must be marked on the writ.

2ndly, That upon every such order, thereafter to be entered, the entering Clerk of the Court, in whose division the same may be, shall, at the request of the party leaving the same, mark the day of the month and year on which the same shall be left for entry, and no writ of *fieri facias* or *elegit* shall be sued out upon any such order, unless the date of such entry shall be so marked thereon as aforesaid.

Writs when sealed must be delivered to the Sheriff or other proper officer, —and returned by him to the Clerks in Court who sued them out, —who are to file them of record.

3rdly, That such writs, when sealed, shall be delivered to the Sheriff or other officer to whom the execution of the like writs issuing out of the superior Courts of Common Law belongs, and shall be executed by such Sheriff or other officer, as nearly as may be, in the same manner in which he doth or ought to execute such like writs; and such writs, when returned by such Sheriff or other officer, shall be delivered to the Clerks in Court, by whom respectively they were sued out, or be left at their respective seats, and shall thereupon be filed as of record in the Office of the Six Clerks of this Court. And that, for the execution of such writs, such Sheriff or other officer shall not take or be allowed any fees other than such as are or shall be, from time to time, allowed by lawful authority for the execution of the like writs issuing out of the superior Courts of Common Law.

Writ of *venditioni exponas*, —in what cases.

4thly, That if it shall appear, upon the return of any such writ of *fieri facias*, as aforesaid, that the Sheriff or other officer hath, by virtue of such writ, seized but not sold any goods of the person ordered to pay such sum of money or costs, as aforesaid, the person to whom such sum of money or costs are payable, shall, immediately after such writ with such return shall be filed as of record, be at liberty, by his Clerk in Court, to sue out a writ of *venditioni exponas*, in the form thereinafter

(*c*) For the form of these writs, vide 1 Beavan.

stated, or as near thereto as the circumstances of the case may require.

By Writ under the New Orders.

Indorsement of the *elegit* and *fieri facias*.

5thly, That on every such writ of *fieri facias* and *elegit*, so to be issued as aforesaid, there shall be indorsed the words, 'By the Court,' and also, thereunder, the calling and place of residence of the party against whom such writ shall be issued, and also the name and residence or place of business of the Solicitor at whose instance the same shall be issued, and the name of the Clerk in Court issuing the same; and that every such writ be also indorsed for the sum to be levied, according to the form used upon like writs issuing out of the superior Courts of Common Law.

Fee to Clerk in Court,

—to Solicitor.

6thly, That for every such writ of *fieri facias, or venditioni exponas*, so to be issued as aforesaid, there shall be allowed to the Clerk in Court issuing the same the sum of eighteen shillings and seven pence; and for every such writ of *elegit*, the sum of one pound ten shillings; and that there be allowed to the Solicitor, at whose instance any such writ of *fieri facias, elegit, or venditioni exponas*, shall be issued, the sum of six shillings and eight pence, for instructions for the said writ; and that there also be allowed to such Solicitor the further sum of six shillings and eight pence, for attending to procure a warrant, and for attending to instruct the officer charged with the execution of such writ.

New writs only applicable where money or costs are to be paid to a party;

—in all other cases, process of contempt must be resorted to.

It is to be observed, that the above orders and writs do not supersede the ordinary remedies of the Court for enforcing its decrees and orders, and that, in fact, they are only applicable to cases in which money or costs are decreed or ordered to be paid by one party to another; they are, consequently, totally inapplicable to cases where any other act is ordered to be done by a party, or even to cases of orders for payment of money into the name of the Accountant General of the Court; orders or decrees of this description must, therefore, still be enforced by the ordinary process of contempt (*d*).

(*d*) It is to be recollected, that, by the 16th sect. of the 1 & 2 Vict. c. 110, it is provided, that if any judgment creditor, who, under the powers of the Act, shall have obtained any charge, or be entitled to

By Process of Contempt.

Proceedings necessary to bring a party into contempt.

Before a party can be said to have incurred such a contempt as will authorize the issue of process against him, it is necessary that he should have been served with a mandate, under the great seal, commanding him to do what the Court requires of him; for the offence committed is the not paying obedience to the great seal (*e*). Thus, where a defendant is required to appear and answer, he must, previously to the issuing of an attachment against him for non-appearance, have been duly served with the writ of *subpœna*, which, till a very recent period, was always issued under the great seal; and so where he is required to obey a decree or order of the Court, he must, before he can be brought into contempt for not obeying it, be served with a writ under the great seal commanding his obedience, and the mere service of a copy of the decree or order, without such a writ, will not be sufficient.

Writ of execution,

The writ, thus served, is termed a writ of execution, and after reciting the order or decree of the Court, (be it final or interlocutory,) or the substance thereof, or of some part thereof, requires obedience to so much of the ordering part as is recited in the writ, and concerns the party to perform (*f*).

—may be issued, although decree or order is not inrolled.

It appears to have been considered, formerly, that it was necessary, before suing out a writ of execution, to have the decree or order inrolled (*g*), and that a party could not have the writ upon the decretal order only drawn up, except in regard of his poverty, or some other cause, the Court should think fit so

the benefit of any security whatsoever, shall afterwards, and before the property so charged or secured shall have been converted into money or realized, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, then, and in such case, such judgment creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly; so that, although Courts of Equity do not enforce their judgments by *ca. sa.*, as the Courts of Law, but merely by process of contempt, upon which a party in default may be arrested, for not obeying the order of the Court, yet as such process is generally considered as in the nature of an execution, it is probable, that it will be held that, upon the equity of the statute, a party arresting another upon such process to enforce the performance of a decree, will have deprived himself of the benefit of the statute.

(*e*) For. Rom. 168.

(*f*) Prac. Reg. 205.

(*g*) Ibid.

By Process of Contempt.

to order, on petition or motion (*h*); since that time, however, the practice of inrolling decrees, has been comparatively little resorted to, and writs of execution are, nevertheless, constantly issued without order, upon the decree being passed and entered; nor does there seem to be any reason why the inrolment of a decree or order should be required, as the foundation for the issue of process in this Court, any more than the inrolment of a judgment is necessary to authorize the issuing of execution in Courts of Law (*i*).

Writs of execution appear to be of two sorts, the ordinary or long writ and the short writ.

Ordinary or long writ of execution.

The ordinary writ formerly embodied the whole decree or order which it was intended to enforce (*k*), but the practice of reciting the whole decree in the writ having been found very inconvenient and expensive, it was provided, by Lord Coventry's Orders (*l*), that from thenceforth, unless the party that sued out such writ should desire that the whole decree, as it is signed and inrolled, be therein recited, the writ, *if it be only for the payment of money*, shall make no other recital but this:—*Cum per quoddam decretum in cur: cancellariæ—die— anno reginæ——ordinat: et adjudicat: existit quod tu solveres A. B. cent: libr: legal: monet: aug: tibi præcip: et firmit: injung: mandam: quod prædictum cent: libr: proefato A. B. debito modo: et hoc nullatenus omit, &c.* (*m*), since that period writs of execution of orders or decrees for payment of money to a party, have been in the form thus prescribed. It seems, however, to have been considered, in one case (*n*), that it was necessary, where a decree embraced other objects than the payment of money, to have a previous order to warrant a writ of execution of that part only which related to the money; but this is clearly inconsistent with the terms of the order above recited, and also with the decision of the Court in a previous case (*o*), and the present practice is to issue them without a previous order.

Short writ of execution.

Issued without order.

(*h*) Prac. Reg. 205; Lord Red. 84.
(*i*) Ante, p. 215.
(*k*) For. Rom. 191.
(*l*) Beames's Ord. 76.
(*m*) Vide Curs. Canc. 175.
(*n*) Parkins v. Morris, 2 Dick. 689.
(*o*) Harvey v. E. I. Company, Prec. in Chan. 129.

By Process of Contempt.

Short order.

It is to be noticed, however, that the form prescribed by the above order, extends only to cases of decrees or orders *for the payment of money by a party to a party*, and that, therefore, a partial writ of execution of any other part of a decree than that which relates to the payment of money, cannot strictly be bad; but the difficulty arising from this circumstance is obviated, in practice, by obtaining what is called *a short order;* that is, an order requiring the performance of the particular part of the decree which it is intended to enforce, within a specified period, and then, upon default made in complying with the terms of that order, enforcing the performance of it by a writ of execution commanding obedience to that order only.

In what cases necessary.

A short order of this nature, is necessary in all cases in which it is intended to enforce the immediate performance of one or more parts of a decree, (except it be a direction for the payment of money *to a party*, in which case, as we have seen, a partial writ of execution may issue without a previous short order): therefore, wherever it is wished to enforce the transfer of stock in the public funds, either to a party or into the name of the Accountant General of the Court, or the payment of money to the Accountant General, or the performance of any other act directed by the decree, it is necessary, in the first instance, to procure a short order directing it to be done on or before a certain day. For this purpose, the practice is to move that the party may do the act required, either on a day specified in the notice of motion, or within a certain time, (viz. a week,) *after being served with a writ of execution of the order to be made upon the motion*. The latter is the most convenient course, where there is any doubt as to the possibility of serving the party with the writ within a specified time, as it obviates the necessity, in case the party should not be served within the time fixed, of applying to the Court for another short order; which must always be done where a time is limited by the order for the performance of an act, and the party cannot be served with a writ of execution of the order within that time.

Not under interlocutory orders.

It may be observed, here, that although in decrees or decre-

tal orders, it is not generally usual to specify the time for the performance of any particular act, the case is different with regard to interlocutory orders made upon motion for the payment of money into the name of the Accountant General; in such cases the practice was formerly to order the money to be paid forthwith, but in *Higgins* v. ——(*p*), Lord Eldon directed, as a general rule, that, in future, upon these motions, a day should be named: and said that where an order is obtained to pay money into the Bank, at a given time, the Court will inquire whether there has been any former order, and, if there has, will make the party shew cause why he shall not pay interest (*q*).

By Process of Contempt.

To obtain a writ of execution, whether of a decree or of the short order, the decree or order intended to be enforced, duly passed and entered, or an office copy duly marked, is left with the Clerk in Court of the party who makes out the writ, which he procures to be sealed. The writ is carefully examined with the order, by the Solicitor, who causes as many copies of it, on plain paper, to be made and served, as there are parties against whom he purposes to enforce the order (*r*). This is done in order that he may have a copy of the writ to serve upon each.

Writ of execution, how sued out.

Generally, a writ of execution, in order to operate as a foundation for process of contempt, should be served upon the party in person (*s*), although, in some cases, where the writ has been left with a servant, and it afterwards appears to have come to the party's hands, it has been held to be sufficient (*t*).

Service of—should be personal.

Personal service is effected by serving the party with a copy of the writ, and shewing him the writ itself under seal. Where the writ of execution is of a decree or order for payment of money to a party, if the party to receive the money does not serve it himself, so that he may, by the immediate authority of the decree, receive the money, it will be necessary that the

How effected.

Where money is to be paid.

(*p*) 8 Ves. 382.

(*q*) By the Act for the Abolition of Imprisonment for Debt, every judgment debt to which a final decree of a Court of Equity is rendered equal, carries interest at the rate of 4 per cent. per annum, from the time of entering up the judgment, 1 & 2 Vict. 110, s. 17.

(*r*) 1 Smith. 429.

(*s*) 2 Harr. 331.

(*t*) Prac. Reg. 208.

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person who does serve it should have and shew to the party on whom he serves it, a letter of attorney from the person to receive the money, and he must also make a demand of the money (*u*). This, as we have before seen, is necessary in cases of decrees for the foreclosure or redemption of mortgages, before a final order can be obtained (*x*), and it is equally necessary in all cases where money is ordered to be paid to a party himself. Where the money is not to be paid to the party himself, but into the name of the Accountant General of the Court, or where any thing else is to be done, such as the transfer of stock, &c., no demand is necessary.

Substituted service.

But although the rules of the Court will not, in strictness, permit process of contempt to issue for disobedience of a writ, except where a party has been personally served with it, yet these rules will be dispensed with under circumstances, and a substituted service will be permitted upon the Clerk in Court of the party to be served. Thus where the party absconds, to avoid service (*y*), or is not to be found (*z*), or keeps his door locked, and only appears at his window (*zz*), the Court will, upon affidavit of the facts, order service of the decree or order, and of the writ of execution, upon the Clerk in Court, to be good service.

Where party absconds, &c.

Or keeps out of the way,

It is to be observed, that the reason for requiring personal service previously to the issuing of process of contempt, is chiefly to prevent surprise; and that, therefore, wherever it can be shewn that the party is not likely to be taken by surprise, the Court will order service upon his Clerk in Court to be good service; thus, where a defendant was present in Court when the decree was pronounced, and afterwards kept out of the way, the Court ordered substituted service of the decree and writ upon her Clerk in Court (*a*), as it did also in *De Manneville* v. *De Manneville* (*b*), where the party had declared that he would not obey the order.

having heard the decree pronounced,

or declares that he will not obey.

It is said, in a book of authority (*c*), that 'where a defen-

(*u*) 2 Harr. 331.
(*x*) Ante, p. .
(*y*) Edwards v. Poole, cited 12 Ves. 205.
(*z*) Prac. Reg. 207.
(*zz*) Henley v. Brooke, cited 12 Ves. 204.
(*a*) Rider v. Kidder, 12 Ves. 202.
(*b*) Ib. 203.
(*c*) Prac. Reg. 207.

By Process of Contempt.

dant was not to be found, and it was thereupon ordered that service of a decretal order and writ of execution on the Clerk in Court should be good, it was held, *per cur.*, that the shewing them and leaving a copy thereof with the Clerk's Agent, at his seat in the office, was sufficient; nor needs there, (in such a case,) a letter of attorney to receive money decreed to bring the defendant into contempt; for the Clerk is not to pay the money, but to give his Client notice to do it.' It seems, however, from the opinion expressed by Lord Eldon, in *Farrow* v. *White*(*d*), that when the decree is for payment of money, and the defendant absents himself, the order should be for service upon the Clerk in Court, *and also at his dwelling house*.

Service on Clerk in Court, should be accompanied by an order to serve it at the dwelling house.

It is to be observed, that the Court never makes an order for service of a writ of execution at the dwelling house of the party, without coupling it with an order for service upon his Clerk in Court, as the party may be out, and the Clerk in Court is supposed to be likely to know where he is better than any one else(*e*).

Order for service at dwelling house alone never made.

In *Tyssen* v. *Ward*(*f*), where a defendant had secreted himself to avoid the service of a subpœna for costs, and his Clerk in Court was dead, it was ordered that the service of the label of the subpœna, for costs, on the defendant's Solicitor personally, and leaving the body at the defendant's place of abode, should be good service. It seems, however, that the proper course, where the defendant absconds or keeps out of the way to avoid service, and his Clerk in Court is dead, is to sue out a subpœna to name a new Clerk in Court, and to procure an order that service of the subpœna upon the Solicitor of the party may be good service(*g*); and then, if no Clerk in Court is appointed, an order may be obtained, upon affidavit of the party's still continuing to abscond, &c., that service of the decree and writ of execution upon the Solicitor may be good service(*h*).

Course of proceeding where Clerk in Court is dead.

Subpœna to name a new Clerk in Court.

With respect to the costs of a writ of execution, it seems

(*d*) J. & W. 643.

(*e*) Ibid. 645.

(*f*) 1 Dick. 166.

(*g*) Ratcliff v Roper, 1 P. Wms. 420; Francklyn v. Colhoun, 12 Ves. 2.

(*h*) Shillabar v. Langdon, ib. 3, notis.

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Costs of writ of execution.

that the party suing it out is not entitled to any costs, unless the writ is disobeyed, and an attachment for contempt issues, upon which the party is arrested, which will entitle the party suing out the writ to the costs (*i*). It is to be observed, however, that although when the attachment has been executed, the party issuing the writ of execution will be considered entitled to his costs, the mere issuing of the attachment will not be sufficient (*k*), and that if, after the arrest, the plaintiff accepts the money ordered to be paid, without insisting upon having the costs of the writ before the defendant is liberated, he will lose his claim to them (*l*). The proper course to be pursued where a defendant is in custody upon an attachment for not obeying an order to pay money, is to move that it be referred to a Master to compute interest on the principal sum, and to tax the costs of the proceedings to enforce the order, and that the defendant be not liberated until the principal, interest, and costs be paid (*m*).

Process of contempt to enforce decrees.

If the party who has been served with a writ of execution does not pay obedience to the decree or order, the proper course, if he is not entitled to privilege of Parliament, is to take out all the processes of contempt against him, such as attachment, attachment with proclamation, commission of rebellion, Serjeant at Arms, &c. (*n*). 'And where the party is taken upon any

(*i*) Beames on Costs, 244.

(*k*) Salmon v. Willis, ib. 389

(*l*) Collins v. Crumpe, 3 Mad. 390.

(*m*) Ibid. notis.

(*n*) It is stated, by Lord Chief Baron Gilbert, (For. Rom. 84,) 'that about fourteen or fifteen years ago they began to shorten the process in execution of the decree, for if they must begin with the attachment, proclamation, commission of rebellion, and spend all the process, it would be a year's time before the decree could be executed so as the plaintiff could have a y effect of his suit; and, therefore, they proceeded to serve the defendant with a copy of the decree, and, upon affidavit of service and refusal to obey the decree, they moved that he might stand committed; and the practice was immediately to commit him to the Fleet; and upon a return of *non est inventus*, by the Warden of the Fleet, the Court ordered a sequestration. That was complained of by the Serjeant at Arms, so that now the practice is that they must either spend the whole process of the Court, or upon affidavit of service of the decree, move for an order that the defendant should stand committed for disobedience, and upon that order he may move for a Serjeant at Arms, and upon his return of *non est inventus*, he may move for a sequestration.' His Lordship then goes on to state reasons why this short course of

of these processes, he is, in strictness, to be straightly committed to prison, and not to be at liberty till he hath performed such part of the decree as is presently to be done, and given security, by recognizance with sureties, if the Court shall so order, to perform the other part of the decree, (if any be to be performed,) at future days and times appointed (*o*).'

By Process of Contempt.

Writ of Attachment.

The process of contempt against a party for disobedience of a decree, differs very little from the process issued for a contempt in not appearing and answering.

Form of.

The first step in the process is a writ of attachment, the form of which is the same with that on mesne process (*p*), but the indorsement explains the purpose for which it was issued (*q*), which is also the case when the attachment is for non-payment of costs (*r*). This writ issues without order, upon the mere filing of an affidavit of the due service of the writ of execution and of the default, and is subject to the same rules, with regard to its execution and return, as an attachment in mesne process, which have been fully discussed in a former part of this treatise (*s*).

Issues without order.

Subject to same rules as in mesne process,

—but is not bailable.

It is to be observed, however, that an attachment for non-performance of a decree, is not, like an attachment for not appearing or answering, a bailable process, and that the party, when taken upon it, must be committed to prison, and not suffered to go at large. And it seems, that if, after arresting a defendant upon an attachment for not obeying a decree or order for payment of money, the Sheriff suffers him to go at large, the Sheriff himself will be ordered, upon motion, to pay the money (*t*). In *Solly* v. *Greathead* (*u*), a similar order was made by Lord

proceeding is justifiable, but it does not appear that it is now the practice to resort to it, except in certain cases in which a proceeding somewhat similar is resorted to, after the decree has been carried into the Master's Office, for the purpose of enforcing the production of documents or the examination of a party upon interrogatories pursuant to the decree, which will be noticed in their proper place. Vide post Chap. xxv, Proceedings under Decrees.

(*o*) 2 Harr. ed. 1808, 333.

(*p*) Ante, v. 1, p. 573.

(*q*) 1 Harr. ed. 1808, 122.

(*r*) Ibid.

(*s*) Vide ante, v. 1, 578, and seq.

(*t*) Levett v. Letteney, Beames on Costs, Appx. 352.

(*u*) Ib. 353; vide etiam Anon. 11 Ves. 170. S. C.

By Process of Contempt.

Eldon, who ordered a Sheriff not only to pay the money for which the attachment was issued, but the costs of the contempt incurred by the party and of the application.

Upon a return of *cepi corpus*, by the Sheriff, the party issuing the attachment must, if he wishes to obtain a sequestration against him, obtain a writ of *habeas corpus cum causis*(*x*), upon which he will be brought up to the Court, and, upon motion, ordered to be turned over to the Fleet Prison, in the same manner as where he is brought up on an attachment on *mesne* process.

Attachment with proclamation.

Upon the return of *non est inventus* to an attachment, an *attachment with proclamations* is the next process to enforce obedience to a decree or order (*y*). The form of this writ is the same with that of the attachment with proclamation in *mesne* process, with the exception of the indorsement, which explains the purpose for which it is issued; and it is sued out, executed, and returned in the same manner as the corresponding writ in *mesne* process (*z*): like the ordinary attachment, it is not a bailable process, and, upon a return of *cepi corpus*, the party arrested must be brought up to the Court, by *habeas corpus*, and turned over to the Fleet Prison.

Commission of rebellion.

If the return to the writ of attachment with proclamations, is *non est inventus*, a Commission of Rebellion issues: this, also, is not strictly a bailable process, and it is governed by the same rules of practice as the same writ when issued in *mesne* process (*a*).

When the party is arrested, he must be brought to the bar of the Court by one of the Commissioners, and then an order may be obtained for his committal to the Fleet.

It seems, however, that if the arrest takes place in vacation, when the Court is not sitting, the Commissioners may either

(*x*) A Messenger is never sent upon such occasions: that officer being employed only where a party is not in custody. Vide ante, vol. 1, p. 602.

(*y*) The stat. 1 Wm. 4, c. 36, s. 15, Rule 1, does not apply to process of contempt to enforce obedience to a decree.

(*z*) Vide v. 1, 605.

(*a*) Ante, v. 1, 610.

By Process of Contempt.

take bail for the appearance of the party, at their discretion, or lodge him, either in the Fleet Prison or in the custody of the Sheriff of the county where he is arrested, for safe keeping, and that they ought not either to keep him in their own houses or allow him to go at large (*b*).

Serjeant at Arms.

Upon a return of *non est inventus* to a commission of rebellion, the Serjeant at Arms must be sent to arrest the party and bring him to the Court. The method of applying for the order to send this Officer, and the Course of proceeding consequent upon the order, are the same as those already pointed out (*c*).

If the party *is taken by the Serjeant at Arms*, he must be brought up to the Court, and then, upon motion, he will be handed over to the custody of the Warden of the Fleet. If the Serjeant at Arms finds the party already in custody, he must lodge a detainer against him at the prison where he is confined, and make a return of his having so done to the Court, whereupon the party may be brought up by *habeas corpus cum causa* and handed over to the Fleet (*d*).

Sequestration

If the Serjeant at Arms is unable to arrest the party against whom the decree is made, he must return *non est inventus* upon his warrant, upon which a writ of sequestration will issue, upon motion, as upon *mesne* process.

—may be issued where party in custody.

This writ will also issue where the party has been taken upon any of the preceding processes and committed to prison (*e*). He must first, however, have been removed into the Fleet Prison, (if he is not already there,) by *habeas corpus* (*f*), and it is to be observed, that the motion for a sequestration may be made upon the Warden's certificate that the prisoner is in his custody for the contempt of the order (*g*), but that it must not

(*b*) Ante, v. 1, 614.
(*c*) Ib. 621.
(*d*) 1 Smith, 432.
(*e*) Errington v. Ward, 8 Ves. 314. The rule is different in cases of contempt upon mesne process, vide ante, vol. 1, p. 630.
(*f*) Ante, v. 1, p. 595.
(*g*) Phillips v. Stephenson, 11 Pri. 473.

By Process of Contempt.

be made till the time for the return of the writ upon which the party has been taken has expired; because, until the return of the writ, it is quite uncertain whether the party will pay the money or not (*h*).

Where he is already in the Fleet.

Some doubt appears to exist as to whether it is regular to issue a sequestration against a party who is already in the Fleet, under process from another Court, but who has not been brought up by *habeas corpus* to the bar of the Court, in order to be turned over to the custody of the Warden, charged with the contempt of the Court of Chancery. This point was much discussed in *Const* v. *Barr* (*i*), before the Vice-Chancellor, who discharged the sequestration, but upon the case coming afterwards before Lord Lyndhurst, the Vice-Chancellor's order was discharged: it was, however, upon a different ground, viz., that the party had waived, by his subsequent conduct, the objection to the sequestration (*k*).

Waiver of objections;

And here it may be remarked, that, in the above case, it was held that the party against whom the sequestration had issued, had waived his right to object to it, on the ground of irregularity, because he gave the sequestrators directions how to deal with the property (*l*).

The nature of this process, and the manner of suing out and executing it, and the effect it has, have already been fully discussed in considering contempts upon *mesne* process.

effect of sequestration upon *choses in action*.

It has been stated, that *choses in action* in the hands of a third party, cannot be taken under a sequestration for *mesne* process, at least without the consent of the party in whose hands they are (*m*), and the rule appears to be the same with regard to sequestrations in execution. The point has been recently discussed, before Lord Langdale, M. R., in *Wilson* v. *Metcalfe* (*n*), in which an application was made to the Court, on the part of the plaintiff, against a person not a party to the cause, to compel her to pay into Court the arrears and future payments of a rent-charge payable by her to the defendant Ness, against

(*h*) Martin v. Kerridge, 3 P. Wms. 240.
(*i*) 2 S. & S. 452.
(*k*) 2 Russ. 16; vide etiam Knowles v. Chapman, ib. 166 n. Davison v. Colling, ib. 167 n.
(*l*) Ibid.
(*m*) Ante, v. 1, 637.
(*n*) 1 Beavan, 263.

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whom a sequestration had issued for his not obeying a decree by which he was ordered to pay money into Court. The defendant was entitled, under the will of his brother, to an annuity of £50, charged upon certain real estates which were devised to Elizabeth Brown, the person against whom the application was made; and, upon the sequestration being issued, the sequestrators served a copy of it on Mrs. Brown, and demanded payment of the arrears of the annuity, which were then admitted by her to amount to £225. This was in December 1837, but nothing further was done till July 1838, when another year's annuity having become due, Mrs. Brown received a notice, from the defendant's Solicitor, requiring immediate payment of the arrears to the defendant; before this, Mrs. Brown's Solicitor offered to pay the arrears to the sequestrators, if the plaintiffs would indemnify her, which offer was declined on the part of the plaintiffs; whereupon Mrs. Brown (having in the meantime received another notice from the defendant's Solicitor threatening to distrain if the arrears were not paid,) paid them over to the defendant. Upon the motion being made, on the part of the plaintiffs, for an order upon Mrs. Brown to pay the arrears and future payments into Court, no objection was made on the part of Mrs. Brown as to future payments, but the payment of arrears was resisted on her behalf; and the Master of the Rolls was of opinion, that after Mrs. Brown had offered to pay the arrears to the sequestratrators upon an indemnity, the plaintiffs were bound to have made immediate application to the Court for an order to compel her to pay them, (which would have been a proper indemnity to her for her obedience to such an order); and that, as they had omitted to do that, she ought not to be compelled to pay the money over again; his Lordship, however, was clearly of opinion that if it had not been for the *laches* of the plaintiffs, in making their application, he should have held the arrears of the annuity liable to the sequestration.

The decision of the Master of the Rolls, in the above case, appears to be in conformity with that of Lord Eldon, in *Francklyn* v. *Colhoun* (n), and of the Lord Chancellor, in *Lord Pelham*

(n) 3 Swanst. 276.

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v. *the Duchess of Newcastle*(o); and it is not inconsistent with that of Sir L. Shadwell, (V. C.,) in *Johnson* v. *Chippindall* (p) referred to in a former part of this treatise (q). In all those cases the choses in action consisted of money in the hands of a third person belonging to the party against whom the sequestration issued, and the party in whose hands the money was, admitted the money to be in his hands and his liability to the party. Thus, in *Francklyn* v. *Colhoun* (r), Mr. Rucker, in whose hands the money was, had admitted his liability by filing a Bill of interpleader. In *Lord Pelham* v. *the Duchess of Newcastle* (rr), it certainly does not appear, by the report, that the banker consented to the order; but the Vice-Chancellor, in *Johnson* v. *Chippindall* (s), assumes that he did, and his decision proceeded upon the express ground that the grantor of the annuity, in that case, had, on a former occasion, assented to a motion, on the part of the plaintiff, to pay the arrears and future payments of the annuity into Court; and so, in *Wilson* v. *Metcalfe* (t), the admission by Mrs. Brown, that the arrears were due to the defendant, formed a material ingredient both in the argument and in the judgment of the Master of the Rolls. The practice, therefore, appears, notwithstanding *Wilson* v. *Metcalfe*, to be much in the state in which it remained upon the decision in *Johnson* v. *Chippindall*, viz., that where a *chose in action* is in the hands of a third party, who is willing to abide by the order of the Court, or who admits it to belong to the party against whom the sequestration has issued, the Court will consider it liable to the sequestration, and will order it to be paid into Court; the difficulty, with regard to the effect of a sequestration upon a *chose in action*, arises, where the individual in whose hands it is, disputes either the amount or the title of the party whose property is sequestered, as to the manner in which the sequestration is to be made available to reach such property. That the Court cannot, in such a case, make an order upon an

(o) 3 Swanst. 290 n.
(p) 2 Sim. 55.
(q) Ante, v. 1, 637.
(r) Ubi supra.
(rr) Ubi supra.
(s) Ubi supra.
(t) 1 Beav. 263. Vide etiam Opie v. Maxwell, cited 4 Ves. 742; Lakes v. Meres, ib.; Toth. 175.

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unwilling party is clear from the cases above referred to; the only question, therefore, is, whether, when the party in possession of the *chose in action* refuses to admit or disputes his liability, the Court will authorize the institution of proceedings, either at law or in equity, for the purpose of enforcing the sequestration against such party: this point still appears to remain uncertain, and for information on the subject the reader is referred to *Simmonds* v. *Lord Kinnaird* (u), where all the authorities which bear upon the question appear to be collected.

Commissioners may sell goods and chattels,

It has been stated that sequestrators under a writ in *mesne process*, although they may break open doors, or open boxes or rooms which are locked, cannot remove goods or chattels, or sell them without an order of the Court (x), which is seldom in such cases granted, unless the goods are of a perishable nature. This, however, is not the case with regard to sequestrations to enforce orders or decrees (y), and the Court will, under such sequestrations, direct the sale not only of perishable commodities, but of goods, such as rents paid in kind, or the natural produce of a farm (z), or household goods and furniture (a). The Court, however, will not sell terms of years, or leasehold estates, or any subject which passes by title and not by delivery, although it will direct the profits to be applied; because sequestrators can give no warranty for title, the property not being vested in them (aa). It is to be noticed, that sequestrators cannot proceed to a sale without an order, upon petition or motion, of which notice must be given (b).

—but not terms for years,

and not without previous order.

Sequestration upon decretal order.

Sequestrators, upon decretal orders made upon motion, appear to have the same powers as sequestrators under a decree, and will be ordered to sell the property sequestered (c).

Effect upon real estate.

The effect of a sequestration to enforce a decree or order, *upon real estate*, is nearly the same as the effect of the same pro-

(u) 4 Ves. 735.

(x) Ante, v. 1, 639.

(y) Wharam v. Broughton, 1 Ves. 180, 184; ante, v. 1, 639.

(z) Shaw v. Wright, 3 Ves. 22.

(a) Mitchell v. Draper, 9 Ves. 208; Caul v. Smith, 3 Bro. C. C. 362.

(aa) Shaw v. Wright, 3 Ves. 23; Sutton v. Stone, 1 Dick. 107.

(b) Mitchell v. Draper, 9 Ves. 208; ante, v. 1, 640.

(c) Cadell v. Smith, 3 Swanst. 308 n.

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cess when issued for a contempt in not appearing and answering (*d*): the principal difference appears to consist in the circumstance, which has been before noticed (*e*), that when the sequestration is for non-performance of a decree, the Court will, upon proper application, give the sequestrators liberty to let and set the property, which it will not do when the sequestration is upon *mesne process*.

—with reference to a conveyance *pendente lite*.

With respect to the time from which lands are considered to be bound by a sequestration, so as to affect a conveyance *pendente lite*, the rule appears to be that where the lands or the profits of lands are the subject of the suit, the title is bound from the filing of the Bill, and every purchaser *pendente lite* comes in at his peril, even though he paid a *bona fide* consideration (*f*); but where the suit is for a personal demand, the land is not liable till sequestration (*g*): and so where an account of profits is decreed against a trustee of land, by way of execution of a trust; there *the person only* is charged for breach of trust in not applying the profits, and the land is not charged but while in the hands of the trustee, nor then neither, till sequestration issued, so that purchasers before sequestration are free (*h*). It is to be observed, however, that even where lands are collaterally charged by a sequestration, as in the latter case, a voluntary conveyance, executed before the sequestration issued for the purpose of defeating it, will not have that effect (*i*); and that, in *Witham* v. *Bland* (*k*) where a personal decree had been made against the father, upon which a sequestration issued, Lord Nottingham revived the sequestration against the son who was also the heir; because he did not claim as heir, but under a voluntary conveyance, executed before the sequestration, to defeat the decree. *Witham* v. *Bland* (*l*) afterwards, as it appears, came again before Lord Nottingham, when the son set up another case, that is to say, that, in the year 1653, a feoffment was made to

(*d*) Ante, v. 1, 640.

(*e*) Ibid. 642.

(*f*) Crofts v. Oldfield, 3 Swanst. 278 n.; Bird v. Littlehales, ib. 299; Self v. Madox, 1 Vern. 459.

(*g*) Bird v. Littlehales, ubi supra, Hamblyn v. Ley, ib. 301 n.; 1 Dick. 94. S. C.; and vide Coulston v. Gardiner, ib. 279 n.

(*h*) Crofts v. Oldfield, ubi supra.

(*i*) Coulston v. Gardiner, ubi supra; Bird v. Littlehales ubi supra; Hamblyn v. Ley, 3 Swanst. 301.

(*k*) Ibid. 276 n.; vide etiam Langley v. Bredon, cited ibid. 284 n.

(*l*) Ibid. 277, 284 n.

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the use of the father for life, with remainder to the son in tail, with power of revocation, but no new power of limitation, reserved; and that afterwards, *anno* 1668, (two years after the sequestration,) the first settlement was revoked, and new uses were limited again to the son; upon this state of the case his Lordship held, that the sequestration had been defeated by the revocation and new limitation of uses, and discharged the writ (*m*).

Sequestration binding from order for it.

With reference to this subject, it is to be remarked, that a sequestration binds from the time of awarding it, and not from the time of executing it or of its being laid on by the Commissioners (*n*). It also affects copyhold lands as well as freehold (*o*); and, it seems, that where tenants of an estate under sequestration quit, the sequestrators will be authorized, upon application to the Court by the party, to let the estate (*p*). The order for this purpose, however, must be obtained upon motion, with notice, which, before the recent orders, was not the case with regard to receivers (*q*). It seems that sequestrators upon *mesne process*, will not be allowed to let and set the estate (*r*).

—upon copyhold as well as freehold.

Abatement of sequestration.

It has been before stated, that a sequestration upon mesne process abates by the death of the plaintiff, but is revived with the suit (*s*), and the rule appears to be the same with regard to sequestrations to enforce decrees (*t*). A difference, however, exists in the practice where the abatement of the suit is occasioned by the death of the defendant, against whom the process has issued. In such a case, the sequestration, if upon mesne process, being for a personal matter, is gone altogether, and cannot be revived; but the case is otherwise with regard to sequestrations under a decree (*u*); there the sequestration is

Revivor of—against personal representative.

(*m*) Vide Johnson v. Chippindall, 2 Sim. 55, where a release, by a grantee of an annuity to the grantor after sequestration, was held to be good.

(*n*) Burdett v. Rockley, 1 Vern. 58.

(*o*) Coulston v. Gardiner, ubi supra; vide etiam Marquis of Caermarthen v. Hawson, 3 Swanst. 294 n.

(*p*) Neale v. Bealing, ib. 304 n.; Dunkley v. Scribnor, 2 Mad. 443.

(*q*) Neale v. Bealing, ubi supra.

(*r*) Ray v. ———, 3 Swanst. 306 n.

(*s*) Ante, v. 1, 650.

(*t*) Wharam v. Broughton, 1 Ves. 181; Bligh v. Earl Darnley, 2 P. Wms. 622; White v. Hayward, 2 Ves. 462.

(*u*) Ante, v. 1, 650.

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Revivor of sequestration against heir.

merely abated with the suit, and being in the nature of an execution it may be revived against the personal representative of the party (*x*). It seems, however, that where the decree is for a mere personal demand, the sequestration can only be revived against the personal representative, and that it cannot be revived against the heir (*y*), unless the decree is for a covenant in which the heir is bound, or for the land itself, unless the land descends to an heir in tail (*z*), or to a purchaser, in which case, of course, the land ceases to be bound, unless it has been entailed or conveyed away, subsequently to the decree, or with the view of avoiding the effect of the sequestration (*a*).

Sequestration will not prejudice wife's dower.

—or jointure.

It is to be observed, that a sequestration against the lands of a married man, will not bind his wife's dower after his death, even though the marriage took place after the sequestration issued (*b*); and where a sequestration was awarded to sequester a manor and other real estate belonging to a defendant, to satisfy a decree, out of which manor an annuity was secured to the defendant's wife, which, together with the manor, had been sequestered during the husband's life, upon the application of the wife, after the defendant's death, the sequestration was discharged, as far as respected the annuity (*c*).

No revivor against heir, unless suit is revived against him.

A sequestration will not go or be revived against a heir on the death of the ancestor, unless the suit be revived (*d*); and it is to be noticed that, in such case, the suit must be revived against the *heir;* and that a revivor against the personal representative alone will not warrant the revivor of the sequestration against the heir (*e*).

(*x*) Hawkins v. Crook, 3 Atk. 593; Burdett v. Rockley, 1 Vern. 58; University College v. Foxcroft, ib. 160; Wharam v. Broughton, ubi supra; White v. Hayward, 2 Ves. 464; Hyde v. Greenhill, 1 Dick. 106.

(*y*) Burdett v. Rockley, University College v. Foxcroft, Wharam v. Broughton and Hyde v. Greenhill, ubi supra; sed vide Marquis of Caermarthen v. Hawson, 3 Swanst. 294 n

(*z*) Earl of Athol v. Earl of Derby, 1 Ch. Ca. 220.

(*a*) Ante, p. 716.

(*b*) Burdett v. Rockley, 1 Vern. 118.

(*c*) Proctor v. Reynol, 1 Cha. Rep. 247; Langley v. Breydon, cited 2 Ch. Ca. 46.

(*d*) Derby v. Anciam, cited 2 Ch. Ca. 46.

(*e*) Vide Burdett v. Rockley, 1 Vern. 58, ed. Raithby, notis.

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It is said, by Lord Chief Baron Gilbert, that 'if the decree be upon a covenant which binds the heir, and the defendant dies, such decree may be revived by *scire facias*, against the heir, to shew cause against the decree if the decree be inrolled; but if the decree be not inrolled, by a Bill of revivor, and that when you have revived against the heir and executor, you may also revive the sequestration, *upon motion*, if, upon coming into Court, they can shew no case why the decree should not be revived.'—From this, it appears, that, where the party in contempt dies, it will be necessary that, besides reviving the suit, the plaintiff should obtain an order, upon motion, to revive the sequestration. It does not appear, however, from any of the cases which have been referred to, that such is the practice, or that any further step is necessary to revive a sequestration than an order to revive the suit. In *Hyde* v. *Greenhill* (*f*), where an application was made, on the part of devisees, to discharge a sequestration against land, it does not, upon searching the Registrar's book, appear that any order for reviving the sequestration had been made, beyond the order for reviving the suit against the personal representatives and the devisees, and yet no objection was made on the ground that the sequestration was abated (*g*).

—but no separate order to revive sequestration necessary. *Semble.*

The proper course, where there is an abatement of the suit by the death of the plaintiff, appears to be, for the party whose property is sequestrated, to move that the representative of the plaintiff may revive the suit, within a given time, or else that the sequestration may be removed (*h*). It seems, however, that where sequestration is upon real estate, and the party in default dies, but the plaintiff does not revive the suit against the real representative, the person claiming the land may pro-

Discharge of sequestration upon death of plaintiff.

In what case ejectment may be brought.

(*f*) 1 Dick. 106; and vide Reg. Lib. 1745, A. 526.

(*g*) The order made, in Hyde v. Greenhill, was that 'the sequestration be removed as to the real estate, but not as to the leaseholds and other personal estate; that an account be taken of the rents and profits of the real estate received by the sequestrators since the death of Greenhill; that the Master should tax the costs of the application to discharge the sequestration and of the account, and that the amount should be deducted from what should be found due on the account, and that the remainder should be paid by the sequestrators to the *devisees* of Greenhill.' Reg. Lib. A. 1745—526.

(*h*) Vide White v. Hayward, 2 Ves. 462.

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ceed by ejectment to recover possession of it, and that the Court will not restrain him. Thus where a Bill was filed for an injunction to restrain proceedings at law, in ejectment, brought by a widow on recovery in a writ of dower, and to have the benefit of a sequestration granted by the Court of all the lands of the husband, for satisfaction of a sum of money ordered to be paid by him to the plaintiff, to which the defendant demurred, 'for that the decree was for a personal duty, not for the lands in question, nor for any rent, &c., of or upon the same, and also because the proceedings after the death of the husband had been irregular, there having been no revivor against the heir, but only against the personal representative,' and the demurrer was allowed, and the injunction which had been granted to stay the defendant's proceedings at law was dissolved, 'and the rather for that, after the death of Rockley, no subpœna in the nature of *scire facias* had issued against the heir (*i*).' Where, however, a sequestration is in force, or has been revived, a party claiming an interest in the property sequestered ought not to proceed by ejectment, or other action to recover it, but should apply to the Court to be examined, *pro interesse suo* (*k*), as in the case of sequestrations upon *mesne* process; and in all other respects the proceedings upon a sequestration in execution, are similar to those upon a similar writ issued in mesne process.

Examination *pro interesse suo.*

Duties of sequestrators.

When a sequestration issues for not obeying a decree or order for the payment of a sum of money, the goods of the party, and the rents and profits of his real estates will, under this process, be applicable to the payment of the demand (*l*), which is not the case, as we have seen, where the sequestration is upon mesne process (*m*); however, the sequestrators cannot, without the direction of the Court, make this application of the property sequestered; but they ought to bring the money, arising from the payment of the rent or otherwise, into Court, which they may obtain leave to do upon petition or motion (*n*);

To bring the money into Court.

(*i*) Burdett v. Rockley, 1 Vern. 58, ed. Raithby, notis; Reg. Lib 1681, A. 671, 1682, A. 184.

(*k*) Ante, v. 1, 644.

(*l*) Davis v. Davis, 2 Atk. 24.

(*m*) Ante, v. 1, 635.

(*n*) For the method of compelling sequestrators to account, vide ante, v. 1, 642.

and the party under the decree, who is desirous of having the property sequestered applied in satisfaction of his demand, must apply to the court for that purpose (*o*).

By Process of Contempt.

Serjeant at Arms—revived:

Where the sequestration has been issued upon a return of *non est inventus* by the Serjeant at Arms, and the effects sequestered fall short of the money ordered to be paid, the Court will direct that the order for the Serjeant at Arms and warrant shall be renewed for the residue (*p*).

Execution of deeds, &c., how enforced against a party in prison for contempt.

The process of contempt, which has been before described, is well adapted to the purpose of compelling a party to pay money, or to perform any pecuniary obligation, which he may have been directed to pay or perform by the decree or order of the Court; for, after having arrested him under any of the preceeding processes, it is in the power of the party issuing it, to obtain the payment of the money, or the performance of the obligation, by sequestrating the defendant's property, and applying the proceeds in discharge of the demand; it is not, however, equally well adapted to enforce obedience to a decree, directing the party to do some other act, such as the execution of deeds, or the delivery up of documents; for it is obvious that, where a person is obstinately determined not to do the act required, (and cases of such instances have frequently occurred,) and to submit to the consequences of his contempt by lying in prison, debarred, by the operation of a sequestration from the enjoyment of his property, no power is afforded by the ordinary process of contempt, by which the other party can procure that to be done, which the Court directs should be performed. It is true that, according to the old practice, the Court would, in such cases, set the party a day to perform the decree, and then, if he refused to do it, it might cause him again to be brought up, by an *Habeas Corpus*, and upon his still refusing, take such course as should seem fit (*a*), such as ordering him to be kept close prisoner, and has even gone the

(*o*) 1 Newl. 386.

(*p*) Hopkins v. Adcock, 2 Dick. 443; vide etiam Wright v. Wellesley, V. C. 25, Feb. 1835, cited 1 Smith's Ch. Pr. 438.

(*a*) Prac. Reg. 206; sed vide Call v. Mortimer. 4 Bro. C. C. 89.

By Process of Contempt.

length of setting a fine upon him (*b*), and of restraining his wife and children from coming to him (*c*); yet still a contumacious defendant might hold out, and thereby deprive the plaintiff of all benefit of his decree. The difficulty, almost amounting to a failure of justice, arising from this contumacy of a party, was noticed by the Commissioners for inquiring into the practice of the Court, who, in their report, suggested a remedy for the evil, in a proposition (*d*), which has since, with some variations, been embodied into Sir Edward Sugden's Act (*e*). By this Act it is enacted, 'that when any person shall have been directed, by any decree or order, to execute any deed or other instrument, or make a surrender or transfer, or *to levy a fine or suffer a recovery*, and shall have refused or neglected to execute, make, or transfer, *or levy, or suffer* the same, and shall have been committed to prison under process for such contempt, or, being confined in prison for any other cause, shall have been charged with or detained under process for such contempt, and shall remain in such prison, the Court may, upon motion or petition, and upon affidavit that such person has, after the expiration of two calender months from the time of his being committed under, or charged with, or detained under such process, again refused to execute such deed or instrument, or make such surrender or transfer, *or levy or suffer such fine or recovery*, order or appoint one of the Masters in Ordinary, or if the act is to be done out of London, then, if necessary, one of the Masters Extraordinary, to execute such deed or other instrument, or to make such surrender or transfer, for and in the name of such person, and *to levy such fine, or suffer such recovery* in his name, and *to do all acts necessary to give validity and* operation *to such fine and recovery, and to lead or declare the uses thereof;* and the execution

(*b*) Vide Prac. Reg. 206; where, however, it is said, 'that, in the latter end of Lord Ellesmere's time, the fines being estreated into the Exchequer, were much disputed here.'

(*c*) Webb v. Braithwaite, Prac. Reg. 206. If what Tothill tells us be true, irons were ordered to be laid upon a man in the Fleet, because he would not obey a decree. Ibid.

(*d*) Commiss. Rep. 34.

(*e*) 1 Wm. 4, c. 36, s. 15, rule 15.

of the said deed or other instrument, and the surrender or transfer made by the said Master, and *the fine or recovery levied or suffered by him*, shall in all respects have the same force and validity as if the same had been executed or made, *levied or suffered*, by the party himself; and within ten days after the execution or making of any such deed or other instrument, &c., notice thereof shall be given by the adverse Solicitor, to the party in whose name the same is executed or made; and such party, as soon as the deed or other instrument, &c., shall be executed, &c. shall be considered as having cleared his contempt, except as far as regards the payment of the costs of the contempt, and shall be entitled to be discharged therefrom, under any of the provisions of the said Act applicable to his case; and the Court shall make such order as shall be just touching the payment of the costs of or attending any such deed, surrender, instrument, transfer, *fine, or recovery*.

By writ of assistance.

The same Act, Rule 16, also gives power to the Commissioners, under sequestrations, where a party is in contempt for non-production of documents, to seize such documents and to dispose of them as the Court shall direct (*e*).

Seizure of documents by Commissioners of sequestration.

It is to be observed, that a more summary method may be pursued by a party, to whom possession of an estate has been ordered by a decree or order to be delivered, than can be obtained by waiting for the arrest of the party against whom the decree has been made, under any of the processes before pointed out, that is, by means of a writ of assistance, directed to the Sheriff of the county where the property lies, commanding him to put the plaintiff into the possession of the premises in question, pursuant to the decree (*f*).

Decrees for delivering possession of property enforced by writ of assistance.

Under the old practice of the Court, this writ could not be obtained, without previously suing out and serving a writ of injunction to deliver possession, which could only be procured upon the issuing of an attachment, or other process of con-

Under the old practice.

(*e*) Vide post, p. 814.

(*f*) It seems that, instead of a writ of assistance, the Court has sometimes issued a commission to Justices of the Peace to put the plaintiff into possession, vide Cur. Canc. 371, or a commission of a similar nature to the Sheriff; ib. 272.

By writ of assistance.

tempt, against the parties, for not obeying the writ of execution, which attachment or process, however, was not required to be executed (*g*).

No previous injunction now required.

It seems, that one of the objects, in requiring a previous writ of injunction to be issued before a writ of assistance, was, that any tenants, not parties to the suit, who were in occupation of the land, might be affected, which they would not be, by the order for delivering up the possession (*h*); but the Commissioners for inquiring into the practice of the Court, appear to have been of opinion, that the course of proceeding, where a party obstinately retained possession of land, or other real property, after a writ of execution, of an order to deliver up possession, had been duly served, might advantageously be shortened by the omission of the writ of injunction, and accordingly made a suggestion to that effect (*i*), which has been embodied in the 1 Wm. 4, c. 36, s. 15, Rule 19, whereby it is provided, that where any party obstinately retains possession of lands, or other real property, after a writ of execution of a decree, or an order for delivery of possession has been duly served, and demand of possession made, and upon an affidavit of such service of the writ of execution, and of such demand made thereunder, and a refusal to comply therewith on the part of the person against whom the writ issued, the party issuing it shall be at liberty, upon an affidavit of service of the writ of execution and demand of possession and refusal, to obtain the usual order of course for the writ of assistance to issue, and that the intermediate writs of attachment and injunction, further commanding the party to deliver possession, on any other writ, shall be unnecessary (*k*).

Agsinst Peers and Members of Parliament.

Where the party to perform a decree is a Peer of Parliament, or otherwise entitled to the privilege of peerage, or a member of the House of Commons, he cannot, any more than in the

(*g*) Stribley v. Hawkie, 3 Atk. 275; vide etiam Dove v. Dove, 2 Dick. 618, 619; 1 Cox. 101, S. C 1 Fro. C. C. 375, S. C.; Huguenin v. Baseley, 15 Ves. 180; Green v. Green, 2 Sim. 394, and cases there cited.

(*h*) Vide Venables v. Foyles, 2 Dick. 619.

(*i*) Chan. Rep. 34, 61, prop. 156.

(*k*) Vide Sugden's Acts, by Jemmett.

case of *mesne process*, be proceeded against by attachment, or any of those processes which require his arrest; the only method of making him answerable for his contempt, in not obeying the writ of execution, is by the same process that is resorted to in the case of his contempt by not obeying the writ of subpœna, viz. by sequestration of his property and effects,

Against Peers, &c.

To obtain this process in the case of a Peer or Member of the Commons House of Parliament, the proper course is to obtain an order for a sequestration against him *nisi*, which may be done on motion, upon producing an affidavit of service of the writ of execution under seal, and of the non-performance of the act required (*l*). It appears, however, that, in such cases, previous notice of the motion must be given (*m*).

Order for sequestration *nisi*,

The order *nisi* for a sequestration being drawn up, passed, and entered, must be served personally in the same manner as a similar order in mesne process, unless the case happens to be one of those in which, as we have seen, personal service will be dispensed with, and substituted service directed (*n*). It seems that, where there has been a due service of the original writ upon a person entitled to the privilege of peerage in England, and afterwards he goes into another country, (viz. Scotland,) personal service of the order *nisi* upon him there will be good (*o*).

service of,

The order *nisi*, for a sequestration against a Peer or Member of Parliament, will be made absolute, upon motion or affidavit of service of the order *nisi*.

how made absolute,

The method of enforcing the performance of a decree or order against a corporation aggregate, has been already described (*p*).

against a corporation.

(*l*) When the decree is to pay money to a party in person, the letter of attorney authorizing the person making the demand must be produced, and the execution of it, as well as the demand, proved by affidavit. Crawley v. Clarke, 3 Bro. C. C. 373.

(*m*) Ibid.

(*n*) Ante, v. 1, 653; Shuttleworth v. Earl of Lonsdale, 2 Cox. 47; Crawley v. Clarke, ubi supra.

(*o*) Davidson v the Marchioness of Hastings, 2 Keen. 509.

(*p*) Ante, v. 1, 194.

Of Enforcing the Execution of Decrees.

Process of contempt, how made absolute in Ireland.

It is said, that the Court of Chancery, in England, may, upon the return of *nulla bona* to a sequestration, issue a sequestration against the defendant in Ireland (*q*). It seems, however, extremely doubtful, whether such process could be issued, by reason of the difficulty of knowing to whom the writ should be directed; and it is to be observed, that the statute 41 Geo. 3, c. 90, provides a much more certain means of reaching a defendant in Ireland, than that of issuing a sequestration out of the Chancery of England, by the inrolment of the decree or order made by the Court here, in the Irish Court of Chancery (*r*).

It may be stated here, that the effect of process of contempt for non-performance of a decree, in preventing the party from being heard, &c. is the same as the effect of the same process for not obeying the subpœna (*s*), and that it may be cleared, waived, or discharged, in nearly the same manner (*t*).

(*q*) Fryer v. Bernard, 2 P. Wms. 261; ante, v. 1, 629, n.

(*r*) Ante, v. 1, 282.

(*s*) Ante, v. 1, 655.

(*t*) Ibid 660, 661, 665.

CHAP. XXV.

PROCEEDINGS UNDER DECREES AND ORDERS.

Sect. I.—*Feigned Issues.*

It has been already stated, that, if any matter of fact in question in the cause, is strongly controverted, the Court will direct the matter to be tried, by a jury, in a Court of Common Law: for which purpose, it will order an action to be brought, in which a feigned issue is raised in the manner before pointed out (*a*).

In what cases directed.

The attention of the reader has already been called to the circumstances under which the Court will be induced to permit such an issue for the purpose of trying a fact, positively denied by the answer, but which is supported by the evidence of *one* witness only, with corroborating circumstances (*b*), and to the peculiar nature of the direction with which such permission will be accompanied, with regard to reading the defendant's answer at the trial of the issue (*c*). There are many other cases, however, in which issues will be directed; thus, if there is a contrariety of or contradictory evidence, and the persons giving it are of equal credit, and have had equal opportunities of information, and the evidence is so equally balanced, on both sides, that it becomes doubtful which scale preponderates, the Court will, in general, direct an issue, in order to relieve and ease its own conscience, and to be satisfied, by the verdict of a jury, of the truth or falsehood of the facts controverted, lest, taking upon itself to pronounce decidedly a matter of such uncertainty, it might do injustice to one of the parties, by determining against the real truth of the fact (*d*). There are cases, also, where the Court will direct issues, although there is no contradictory evidence, or any matter to embarrass the Court, or to prevent

Where fact denied by answer, is supported by evidence of *one* witness.

Where evidence contradictory.

Where evidence is not contradictory.

(*a*) Ante, p. 631.
(*b*) Ante, p. 406.
(*c*) Ibid.

(*d*) Mad. P. & P. 621; Stokes v. Edmeades, 1 M'Clel. & Y. 436.

In what cases directed.

its coming to an immediate decision upon the evidence before it; these cases, however, are principally confined to those in which the Common Law invests a party filling a particular situation with certain rights, of which it is the object of the suit to divest him. Thus, an heir at law is so far regarded by the Courts, that it is considered, that all freehold estates of which his ancestor died seised, or to which he was entitled at the time of his death, are vested in him, unless it is shewn that the ordinary course of descent has been interrupted, by the ancestor having executed a will; and so strongly do Courts of Equity consider the claim of the heir, that they will not, if the heir objects to it, even where the evidence before them is such as to leave no ground for doubt upon the subject, take upon themselves to establish a will affecting real estate, without previously having the opinion of a jury upon an issue *devisavit vel non* (*e*). So, also, in the case of a rector, his Common Law right to all the tithes of his parish is considered so strong, that the Court would not take upon themselves the responsibility of deciding against it, even upon the most indubitable testimony, if the rector thought proper to insist upon having it tried by a jury (*f*).

Where heir at law disputes a will.

Where a rector disputes the fact of a modus;

Thus, in all cases, the right of a rector to an issue to try the validity of a modus or composition in lieu of tithes, was considered indisputable; and the same rule was extended to a vicar who had established his general right to the tithes in question, under his endowment. (*g*). It is to be observed, however, that, although the right of a rector or vicar to an issue to try the validity of a modus was indubitable, yet it was only so where his title to the tithes was undisputed; where the occupiers set up and proved a different title, such as a distinct grant of tithes to the persons under whom they claimed, supported by evidence of constant non-payment to the rector, to rebut which there was no evidence on the part of the rector, he was not considered entitled to an issue (*h*).

(*e*) Lord Fingal v. Blake, 1 Moll. 113; Tucker v. Sanger, 1 M'Clel. & Y. 424.

(*f*) Williams v. Price, 4 Pri. 160.

(*g*) Adams v. Evans, 4 Pri. 14.

(*h*) Vide Wilmot v. Kellaby, Daniell's Exch. Rep. 116, 5 Pri. 355, sub nomine Wilmot v. Hellaby, S. C. and the cases there cited; vide etiam Barker v. Baker, Wightw. 397.

In what cases.

How heir at law may forfeit his right to an issue.

And even an heir at law, may, by his conduct, deprive himself of his right to an issue to try the validity of a will, as where, if the administration under the will would affect the real estate, which is subjected to the payment of debts, he at first opposes the probate in the Ecclesiastical Court, and then withdraws his opposition, and stands by and allows the executors and devisees to pay away large sums of money under the will (*h*). Or where, upon a Bill to perpetuate the testimony of the witnesses to the will, he does not cross-examine the witnesses, but takes his costs as a disinherited heir (*i*). So where he acquiesces in a will, in such a manner as would bar his possessory rights at law, (viz. for twenty years,) and puts the party claiming under it in a worse situation than he would have been in had he disputed the will originally, he will not be entitled to an issue (*k*).

Heir only entitled to an issue where there is a trust.

It is to be remarked here, that the right of an heir at law, to an issue *devisavit vel non*, applies only to cases where there is a trust for the Court to execute; in other cases, the Court would have no ground to interfere in directing the mode of trial, but can only take care that a fair trial should be had, by putting outstanding terms aside, &c.; but where there is a trust, the whole question comes properly within the jurisdiction and under the control of the Court; and, in that case, it always directs the issue *devisavit vel non*, and on the certificate of the verdict, proceeds to establish the will against the heir (*l*).

Right of an heir to an issue may be waived even though he is an infant.

The right of an heir at law to an issue, is one which he may waive; and, even in the case of an infant, if his Counsel thinks it clear, from the evidence already examined, that there is no ground to dispute the will, he will be justified in declining an issue (*m*).

If an adult heir at law refuse an issue, on the hearing of the cause, the Court will establish the will against him, though he did not admit the will by his answer (*n*).

In all other cases, the granting of an issue a matter of discretion.

Except in the cases of an heir at law, or of a rector or

(*h*) Pike v. Hoare, 1 Ambl. 428, 2 Eden, 182. S. C.

(*i*) Ibid.

(*k*) Tucker v. Sanger, M'Clel. 424; 1 M'Clel. & Y. 425; 13 Pri. 119.

(*l*) Lord Fingal v. Blake, 1 Moll. 113.

(*m*) Levy v. Levy, 3 Mad. 245.

(*n*) Jackson v. Barry, 2 Cox. 225.

In what cases.

vicar, who are entitled to issues, as a matter of right, the granting of an issue by a Court of Equity, is entirely a matter of discretion in the Court, which it will not exercise without due deliberation. 'There is no doubt that the Court has, by its constitution, the power of deciding, incidentally, every question of law or fact which arises upon a subject over which it has complete jurisdiction. The trial by issue, forms no necessary appendage to the proceedings of a Court of Equity. It is only through the medium of a fictitious form that the Court is able to obtain this auxiliary inquiry; the expense and delay attendant upon it, are only to be incurred when the Court, in the exercise of a sound discretion, may deem it necessary; except in cases where practice has made it a matter of right, as where required by an heir at law, or a rector (*o*).'

But mistake i granting an issue is a ground of appeal.

But, although the granting an issue is, except in the cases above noticed, a discretionary act, a mistake in the exercise of that discretion, is a just ground of appeal; and, therefore, if the Court refuses an issue, and the Court of Appeal should think that the contrary decision would have been a sounder exercise of discretion, it will rectify the order of the Court below accordingly (*p*); and so, where the House of Lords thought that the Court below had directed issues improperly, it reversed the order directing the issues, and remitted the cause, with directions to the Judge, to decide upon the matter himself (*q*).

It is stated, by Lord Eldon, in *O'Connor* v. *Cook* (*r*), that 'it is pretty clear that Courts of Equity, in ancient times, were more in the habit of taking to themselves the decision of questions of fact, than they have thought it wise or discreet in later times;' still, however, the practice of granting issues, is limited to cases in which, as before observed, the Court, in the fair exercise of its discretion, considers that justice will best be obtained by that course. The Court will never direct an issue, where it feels that it is itself more competent to decide the point than a jury; thus, where the question

Issue not granted where Court itself more competent than a jury,

(*o*) Per Sir Thomas Plumer, M. R. Short v. Lee, 2 J. & W. 495.

(*p*) Vide Hampson v. Hampson, 3 V. & B. 43.

(*q*) Nicol v. Vaughan, 2 Dow. and Clark, 420; 5 Bligh, N. S. 505, S. C.; vide etiam. Earl of Winchilsea v. Garetty, 1 M. & K. 253, S. C.

(*r*) 6 Ves. 665, 671.

In what cases.—as in cases of conflicting documents.

depends entirely upon conflicting documents, the Judge in Equity is more competent to draw the proper conclusion than a jury, and in such cases, therefore, an issue will not be directed (*s*).

Secus conflicting presumptions,

It seems, however, that where the question turns upon conflicting presumptions of fact, the Court will send the case to be tried by a jury, as in *Mason* v. *Mason* (*t*), where the right depended upon whether the father or son survived, and it appeared that they were both shipwrecked together, on their voyage from India, when all on board perished, the Court directed an issue, to try whether the son was living at the death of the father.

Issue not granted, where, if facts found to be true, the law would be adverse.

The Court will refuse an issue, where, though the facts are controverted, it sees clearly that, even if found to be as the party asking for the issue alleges them to be, the party would not in law be entitled to relief; thus, where a modus was clearly invalid as laid, the Court refused to grant an issue, but decided upon the point of law (*u*); and so where the defence to a Bill for tithes, was a mere prescription in *non decimando*, without any colour of title, the Court would not send it to a jury, because such a prescription was no defence, even where the Bill was brought by a lay impropriator (*x*).

—or where jury can only find one way.

And so where it is obvious that the finding of a jury can be in no other way but one, an issue will be refused; thus where, in a suit for tithes, a legal exemption was set up, which was supported by proof of non-payment to the rector for a very long period of time, but no satisfactory evidence was given of the legal origin of the claim for exemption, and the Court was satisfied that it was impossible to throw any further light upon the subject than was afforded by the evidence already before it, an issue was refused; because the Court was of opinion that, were the evidence presented to a jury, they would not be justified in finding that such an exemption ever existed (*y*). So

(*s*) Fisher v. Lord Graves, 1 M'Cl. & Y. 362, sed vide Collins v. Sawrey, 4 Br. P. C. 692.

(*t*) 1 Mer. 308.

(*u*) Blackburn v. Jepson, 3 Swanst. 132.

(*x*) Berney v. Harvey, 17 Ves. 119.

(*y*) Ross v. Aglionby, 1 Russ. 489.

In what cases.

in tithe cases, where the Court was of opinion that a modus, as set up by the answer, even if proved, would be bad in law, it would decree an account against the defendants, without directing an issue to try the validity of the modus (z) Upon the same principle, although there was evidence of a continued adulterous intercourse between a married woman and her paramour, the Court refused to grant an issue to try the legitimacy of her child, because there was also evidence of such access between the husband and his wife as was consistent with the presumption of the child's legitimacy (*a*).

—nor in the case of forgery

In the *Bishop of Winchester* v. *Fournier* (*b*), a case is mentioned of *Bridge* v. *Eddows*, where the Bill sought to have a forged bond delivered up; but Lord Hardwicke directed an issue, though it is stated to have been proved plainly, that, at the time of the alleged execution of the bond, the pretended obligor was not at the place where he was supposed to have executed it, and his Lordship is represented to have said, 'that he could not try the question;—that it was a fact of forgery which he could not enter into and which must be tried;' in *Peake* v. *Highfield* (*c*), however, the Master of the Rolls, (Lord Gifford,) said, he did not apprehend that Lord Hardwicke meant to go to the full extent of the words there imputed to him, and that in some of the cases which he had referred to, the Court did try the fact of forgery, and, at the hearing, ordered the forged instrument to be delivered up (*d*).

Unless there is conflicting evidence.

In *Peake* v. *Highfield* however, although the Master of the Rolls was of opinion that the Court had jurisdiction, without directing any trial at law, to declare an instrument forged, and to order it to be delivered up, yet as both the defendant and a witness had sworn to the execution of the instrument, he considered it would be too much for him to make, at once, a decree in favour of the plaintiff, and, therefore, he directed an issue to try whether the deed in question was the deed of the party by whom it purported to be executed.

(z) Goodenough v. Powel Russ. 219.

(*a*) Bury v. Phillpot, 2 M. & K. 349.

(*b*) 2 Ves. 446.

(*c*) 1 Russ. 559.

(*d*) Vide the Bishop of Winchester v. Fournier, ubi supra; and Masters v. Braban, 1 Russ. 560 n.; Seccombe v. Fitzgerald, ib. 561 n.; White v. Hussy, Prec. in Ch. 14.

In what cases.

Issue will not be granted upon a mere suggestion, unsupported by evidence.

It is to be observed, that it is generally in those cases only where there is contradictory evidence, that the Court will be induced to grant an issue to try a controverted fact; a mere suggestion upon the record, unsupported by evidence, in opposition to evidence on the other side, will not be sufficient; thus, where the Master of the Rolls (Sir J. Leach,) had directed issues to try the validity of a bond, merely upon the surmise and suggestion of a party, the bond being unobjectionable on the face of it, and all the evidence, as to the circumstances under which it was obtained, before the Court upon the report of a Master, the House of Lords reversed the order directing the issues, and remitted the cause to the Master of the Rolls, with directions to him to decide upon the matter himself (*e*).

But may be granted where case not sufficiently proved.

It must not, however, be understood, that, unless there is contradictory evidence, the Court is, in all cases, precluded from sending a matter to be investigated before a jury; it may happen that, although the evidence is all on one side, it is still not sufficient to satisfy the conscience of the Court that the fact is as it is represented to be, and in such cases the Court is in the habit of directing an issue to try the fact, although the evidence in support of it is not opposed by any adverse claim on the other side; thus, in *Moons* v. *De Bernales* (*f*), where the defendants had not disputed the plaintiff's title, but had put him to the proof of it by their answer, upon which the plaintiffs had gone into long evidence in support of their title, which the Master of the Rolls did not deem quite satisfactory, issues were directed to try it (*g*).

Or where there is reason to believe that a witness is interested.

The Court has also, where it has entertained a suspicion that a witness was interested in the result of the cause, directed the matter to be tried by an issue, in order that, upon his examination in the Court of Law, questions might be put to him to discover his interest (*h*).

Or where a material point not in issue, has come into question at hearing,

It is to be remarked, that, although it has sometimes hap-

(*e*) Nicol v. Vaughan, 2 Dow. & Clark, 420; 5 Bligh. N. S. 505. S. C.; vide etiam Earl of Winchilsea v. Garatty, 1 M. & K. 253. S. C.

(*f*) 1 Russ. 301.

(*g*) Vide etiam Burkett v. Randall, 3 Mer. 466.

(*h*) Stokes v. M'Kernal, 3 Bro. C. C. 228.

In what cases. —but not upon a different point from that laid in the pleadings.

pened, that where, upon the hearing of a cause, a matter not in issue has started up, which has appeared to the Court material to the question, the Court has directed an issue to try it (*i*), the Court will not permit a party to take an issue, upon a point in question, in a different form from that which he has stated in his pleadings; thus the Court refused to permit defendants to have an issue to prove matters which were not stated in their answers, but which appeared by the answer of the plaintiffs to their cross Bill (*k*); and, upon the same ground, the Court of Exchequer refused to direct an issue to try the existence of a composition real, where the defendant had only alleged a modus (*l*). So where the plaintiff, in a Bill for a specific performance, fails in proving the terms of the agreement he relies upon, the Court will not assist him by directing an issue to ascertain the terms (*m*); and *e converso*, a party is not entitled to an issue or an inquiry to establish a case relied upon by his pleading, but omitted in proof (*n*).

Or where point raised in pleading is unsupported by proof.

When granted.

At the hearing, &c.

It is to be noticed, that an issue may be granted either upon the original hearing of the cause, or upon a hearing for further directions, or upon exceptions to a Master's report upon an inquiry; and sometimes, where the Court sees that the consequence of directing an inquiry, as to a particular fact, must be that the Master's report will be excepted to, and that an issue must eventually be directed, it will direct the issue at once (*o*). It seems, also, from the judgment of Lord Eldon, in *Agar* v. *the Regent's Canal Company* (*p*), that where a motion is made to commit a party for the breach of an injunction, and the fact of the injunction having been broken is strongly controverted upon the affidavits, the Court will direct an issue to try it. The Court will also direct an issue upon a

Upon motion,

—to commit for breach of injunction

(*i*) Balch v. Tucker, 2 Cha. Ca. 40.

(*k*) Minor Canons of St. Paul v. Kettle, 2 V. & B. 1.

(*l*) Bennett v. Neale, Wightw. 324.

(*m*) Savage v. Carroll, 2 B. & B. 451.

(*n*) Savage v. Carroll, ibid, vol. 1, 548.

(*o*) Norman v. Morrell, 4 Ves. 769, 770.

(*p*) Cooper's Rep. 77.

motion for an injunction (*q*), or for a Receiver (*r*), where the facts upon which the plaintiff relies, as the foundation of his application, are positively denied upon the affidavit of the defendant.

When granted.

In general, however, the Court will not grant an issue upon motion before hearing, unless upon consent; and, in ***Fullagar*** v. *Clark* (*s*), where a motion, on the part of the plaintiff, was made upon the coming in of the answer, that an issue might be directed, to try whether the plaintiff was of competent mind, at the respective periods of the execution of the agreement and lease in question in the cause, and whether such agreement and lease were fairly or unduly obtained and executed, Lord Eldon refused to grant the application without consent; his Lordship, however, founded his objection to the motion upon the fact, that the object of the Bill was to have a lease, made by the plaintiff, delivered up, either as having been made by a person incompetent to make it, or as having been unduly obtained; and he said that if the motion, upon the answer, had been merely for an issue to try whether the plaintiff was of competent mind to execute a deed and nothing more, and that could not be tried in ejectment, he would not say that he would not direct that issue; his Lordship also said, that he had himself, in one or two instances, ventured to interpose in a very early stage of the cause, where a single fact, legitimacy for instance, was to decide every thing, and that, in such a case, this course, without putting the party to the expense of going to replication and the examination of witnesses, was not wrong.

But not upon other occasions without consent.

Secus where object is to try a single fact, upon which the suit depends, *mble.*

It is to be mentioned in this place, that, in an anonymous case in the Exchequer, the Court considered it irregular to direct an issue upon motion, although it was consented to by the other party (*t*).

Issue upon motion refused although consented to.

An issue may be directed, not only upon questions between parties to the suit, but also upon claims brought in under a decree, by persons not upon the record. Thus, where the Master allowed a claim brought in by a Solicitor, for a bill of

Issues granted upon claims by persons not upon the record.

(*q*) De Tastet v. Bordenave, Jac. 516.

(*r*) Gardiner v. Rowe, 4 Mad. 236.

(*s*) 18 Ves. 481.

(*t*) 2 Anst. 480.

Form of. costs, upon which exceptions were taken; upon the hearing of the exceptions an issue was directed (*u*).

One or more issues. The Court, sometimes, directs one issue only, and sometimes several, according to the number of substantial points upon which it is necessary to take the opinion of a jury; and it will, where the point to be decided embraces several circumstances, direct an issue upon each of those circumstances: thus, in *Bryan* v. *Parker* (*x*), a double issue was directed to try the validity of a farm modus; the inquiry being first, as to the existence of the ancient farm; and, secondly, as to the payment of the modus. It seems also that the Court has directed an issue as to a particular clause in a will (*y*).

Double issues.

As to a particular clause in a will.

Venue. Issues concerning lands, or other corporeal or incorporeal hereditaments, ought strictly to be tried in the counties where the same are situate; but the Court will sometimes direct the venue to be laid in another county (*z*). It was laid down, however, by Sir J. Leach, V. C., as a rule, that an order to that effect cannot be made part of the decree or order directing the issue, because the propriety of it depends upon circumstances which are extrinsic to the pleading and proofs, but that a petition must be presented for the purpose of obtaining it (*a*).

Not changed except upon special application.

Party supporting the affirmation to be plaintiff. In directing an issue, the Court directs the party supporting the affirmative to be the plaintiff in the issue; thus, in tithe cases, the defendant setting up a modus or composition, being the party to support the modus, is considered as the proper party to be the plaintiff at law (*b*).

Settled by Master, It usually forms part of the order, that the issue is to be settled by a Master, in case the parties differ about the same.

(*u*) Price v. Price, cited 2 Smith's Ch. Pr. 76.

(*x*) 1 Younge & C. 170; vide etiam Bailey v. Sewell, 1 Russ. 239.

(*y*) Hippesley v. Horner, Seton, 349; vide etiam Earl of Newburgh v. Countess of Newburgh, 5 Mad. 364.

(*z*) Chapman v. Smith, 2 Ves. 510.

(*a*) Sparke v. Ivatt, 1 S. & S. 366. The decision in Chapman v. Smith, above referred to, appears, at first to be at variance with this rule; but it will be seen, upon reading the case, that the circumstance which induced the Court to direct the issue into another county, was apparent on the face of the pleadings.

(*b*) Chapman v. Smith, 2 Ves. 506, 516.

By whom to be brought, and to select the Court.

The plaintiff in the issue has the right of selecting the Court in which it is to be tried; formerly he could elect only between the Queen's Bench or the Common Pleas, the practice of the Court being not to send it to the Court of Exchequer, unless there was some special reason for it, in which case a special order must have been obtained (c). Since the alteration of the practice, however, the plaintiff may select any of the three Common Law Courts (d).

Trial at Bar,

It is said that the Court seldom or ever directs a trial at Bar, but only intimates that it would be desirable (e); this, however, is not strictly correct, for although the Court, owing to the great increase of expense attendant upon trials at Bar, is very cautious in directing an issue so to be tried, yet frequent instances are to be found in which such trials have been directed (f); and, it seems, that even new trials may be directed of issues which have been tried at Bar (g). In *Parker* v. *Hart* (h), Lord Hardwicke directed the trial to be at the Bar of the Court King's Bench, provided the party praying it would consent that, if he prevailed, he would be contented with Nisi Prius costs (i).

—new trials after.

Admissions.

In directing an issue, the Court will order the parties to make such admissions as are necessary to raise the question to be determined (k). It will also order the parties to produce, at the trial, all documents in their possession, custody, or power, which the other parties may require, or which the Court may think necessary for a complete investigation (l); and, if such order does not form part of the original order directing the issue, it may be obtained afterwards, upon motion (m). The rule, as to producing papers, on a trial at law directed by the Court of Chancery, is this:—If the Court, on motion or by

Production of papers.

Rule as to, in case of issues.

(c) Antrobus v. East India Company, 5 Mad. 3.

(d) 2 Smith's Ch. Pr. 79.

(e) 2 Mad. P. & P. 626.

(f) Vide Baker v Hart, 3 Atk. 542; 1 Ves. 28. S. C.; Hite v. Salter, 2 Dick. 495; Richards v. Symes, 2 Atk. 320; Attorney-General v. Montgomery, ib. 378.

(g) Regina v. Ball de Bewdley, 1 P. Wms. 21?; Richards v. Symes, 2 Atk. 320; Baker v. Hart, 3 Atk. 542; 1 Ves. 28. S. C.; Coker v. Farewell, 2 P. Wms. 563.

(h) Ubi supra.

(i) Vide etiam Hite v. Salter, 2 Dick. 495.

(k) Fenwick v. James, Seton on Decrees, 318.

(l) Carte v. Hodgkin, ibid. 342.

(m) Marsh v. Sibbald, 2 V. & B. 375.

Production of Papers.

decree, directs a trial, that trial is directed in such a way, that all productions which the Court conceives to be useful upon that trial, the creature of its own direction, shall be made.

Documents in the hands of another party.

Upon this principle, the Court will order documents, which are in the possession of another defendant, to be produced at the trial of an issue (*n*), even though such defendant declines to be a party to the issue (*nn*). The rule is different with respect to the trial of actions not directed by the Court; as, for instance, where a Bill is filed for an injunction against an action, and for relief, and, the injunction being refused, the defendant goes on at law to a trial,—there the plaintiff can only read by the direction of the Court, what he may read without that direction, viz., the answer, and then he may read every book, memorandum, letter, or paper referred to by that answer; as every such book, letter, &c., is part of the answer. 'It is read, as being part of the answer, and the plaintiff must shew that what he prays may be produced is, in effect and substance, part of that answer, unless the trial is directed by the Court itself, on motion, or by decree; but there is no instance of directing the answer of any other person, except of the defendant in that cause, or any part of it, to be read upon a trial not directed by the Court itself (*o*).'

Secus in the case of actions not under the direction of the Court

As to documents held in *autre droit*.

It is to be observed, that, although in the case of a trial at law, directed by the Court of Chancery, the Court has power over every party in the cause, who is interested in the question to be tried, to compel such production as may be necessary for a complete trial, such production will not be ordered of documents which the party holds in a distinct character, such as mortgagee, &c. (*p*). In a case, however, before the Court of Exchequer, the defendants, in a tithe suit, were ordered to produce, at the trial of an issue and before the Master, deeds produced by them at the hearing, though belonging to their landlord, who was not a party, or to admit, at the trial,

Unless produced at the hearing in Court.

(*n*) Marsh v. Sibbald, 2 V. & B. 375.

(*nn*) Pindar v. Smith, Mad. & Geld. 48.

(*o*) Vide Marsh v. Sibbald, ubi supra.

(*p*) Pindar v. Smith, ubi supra.

the facts which the deeds were produced at the hearing to prove (*q*).

Production of Papers.

It is to be remarked, that the ordinary order for the production of books, papers, and writings, before the Master, will not be sufficient to compel their production at the trial, such production must be specially ordered, and usually forms part of the order directing the issue; where that is not the case, a special application must be made to the Court (*r*).

Must be specially ordered.

Where the Court has ordered an issue or an action at law, with directions for a production of papers, &c., a Bill of discovery cannot be filed without leave of the Court (*s*).

Bill of discovery will not lie for.

Some doubt appears to exist with respect to the right of the Court, when it directs an issue, to order the parties themselves to be examined, without their consent. Instances occur in the books, in which orders for such examinations have been made (*t*); and again there are others in which they have been refused (*u*). Upon examination of these cases, however, it will be found, that the rule is against the examination, when the issue is directed at the hearing of the cause, or upon further directions, unless the party is merely a nominal one; but that where the issue is directed upon an interlocutory application, on the ground that the affidavits, on both sides, are conflicting, as where an injunction is asked for upon the affidavit of one party, and opposed upon that of another, and an issue is in consequence directed, there it is considered quite fit that they should both be examined (*x*).

Examination of parties;

in what cases, without their consent.

It is to be observed, that where the Court directs a party to be examined as a witness, no objection is waived, except that which arises from his being a party in the cause (*y*), and that the meaning of the order, is not that he should be a witness for the party himself, or for the other side, but that he should be a

Order for waiver no objection.

(*q*) Pulley v. Hilton, 10 Pri. 118.

(*r*) Marsh v. Sibbald, 2 V. & B. 375.

(*s*) Cooke v. Marsh, 18 Ves. 209; vide Few v. Guppy, 1 M. & C. 487, 507.

(*t*) Vide exparte Dister, Buck. 234; Harwood v. Harwood, cited 4 Mad. 236; Gardiner v. Rowe, ibid.; De Tastet v. Bordenave, Jac. 518.

(*u*) Vide Howard v. Braithwaite. 1 V. & B. 374.

(*x*) De Tastet v. Bordenave, ubi supra.

(*y*) Rogerson v. Whittington, 1 Swanst. 39.

Examination of parties.

witness for the Court (z); in fact, that he should undergo a *viva voce* examination, for the purpose of eliciting the truth more clearly than can be done by affidavit or depositions in writing.

Issue, how drawn

The form of the issue having been pointed out by the decree or order, a draft of the record, in an action at law, is prepared by the plaintiff's Solicitor, in which the pretended plaintiff declares, that he laid a wager of five pounds, with the defendant, on the question in dispute; and avers that the fact is as he contended it was, and that he therefore brings his suit for the five pounds; the defendant, by his plea, admits the wager, but avers the contrary to be the fact; whereupon the issue is joined, which is directed to be tried (*a*).

—and settled

—by Master.

When the plaintiff's Solicitor has prepared the issue, he sends a copy thereof to the defendant's Attorney, and the same is settled by him. If the parties are unable to agree upon the issue, a fair copy of the issue is made and left in the Master's Office; a warrant is then taken out and served on the Clerk in Court, on leaving the same; the other party then takes a copy, and the issue is settled by the Master, on a warrant taken out for that purpose (*b*).

Master's certificate.

When the issue has been settled, the Master certifies accordingly. This certificate is filed at the Report Office, and a copy of the issue, with notice of trial endorsed, is delivered to the defendant's Attorney, the record is then made up, and the trial takes place in the usual manner (*c*).

Special jury.

View.

If either of the parties require a special jury, a motion for one should be made to the Court of Chancery (*d*). Where lands are in question, the Court will sometimes order the jury to have a view, and where they are to have a view of a particular manor, the Court will order them, sometimes, to take a view of the whole and ascertain the bounds of it (*e*).

Proceeding where plaintiff makes default.

The decree or order directing the issue, always specifies the time when it is to be tried; but it seems that the Court has no power to make a compulsory order to force the parties to proceed on the issue; if, however, the plaintiff make de-

(z) De Tastet v. Bordenave, ubi supra.

(*a*) 1 Newl. Pr. 350.

(*b*) 2 Smith's Ch. Pr. 80.

(*c*) Ibid. 81.

(*d*) Anon. 2 P. Wms. 68.

(*e*) Prac. Reg. 263.

fault, in taking the record down for trial at the time appointed, the Court will order the issue to be taken *pro confesso* against him (*d*). It is stated, that, in the Court of Exchequer, the plaintiff at law is allowed to make default in going to trial once (*e*), but such is not the rule in this Court, although, when there is a reasonable ground shewn for the indulgence, the Court will, upon application, give the plaintiff leave to postpone the trial (*f*). The probability of the absence of the plaintiff's Counsel, at the time of the trial, has been held a reasonable ground for putting off the trial (*g*).

Taken *pro confesso.*

It may be mentioned, that, in *Humpage* v. *Rowley* (*h*), the defendant obtained permission, from the Court of K. B., to carry down the record *by proviso*. Such permission, however, if proper at all, should be given by this Court. It may also be mentioned that in a case before Sir J. Leach, V. C., where an issue was directed to be tried at Chester, but no trial took place, upon a motion being made that the plaintiff might be directed to try the issue at the next Chester assizes, or otherwise that it might be taken *pro confesso* against him, the order to that effect was made (*i*).

Record carried down by *proviso.*

A plaintiff may be directed to try the issue;

or in default of, issue will be taken *pro confesso.*

It is to be observed, that this case does not militate against the rule above laid down, since the order made, was the one asked for, and no other could have been pronounced; but it is right to state that, in *Powell* v. *Wood* (*k*), Lord Lyndhurst appears to have refused to make an order, to take an issue *pro confesso*, absolute in the first instance, and is reported to have made the order *nisi*. It does not appear, however, what the order *nisi* in that case was, and no trace of it is to be found in the Registrar's book (*kk*).

It is the duty of the defendant in the issue, to name an Attorney to appear for him in the Court of Law in which it is to be tried, and, if he neglects to do so, an order may be obtained that he may name an Attorney in four days, and that, in default, the issue be taken as tried and a verdict given for the plaintiff (*l*).

Defendant must name an Attorney,

—or in case of default, issue taken as tried.

(*d*) Bearblock v. Tyler, 1 J. & W. 225.

(*e*) Mitchell v. Rabetts, cited ib. 226.

(*f*) Bearblock v. Tyler, ubi supra.

(*g*) Ibid.

(*h*) 4 T. R. 767.

(*i*) Anon. 4 Mad. 255.

(*k*) 1 Russ. & M. 354.

(*kk*) The point is now under the consideration of the Lord Chancellor in Casborne v. Barsham, heard 23 Jan. 1840.

(*l*) Wilson v. Ginger, 2 Dick. 521; Constable v. Ange: cited

Trial.

After an order to take the issue *pro confesso*, the cause should be set down for further directions, and to have the issue taken *pro confesso* pursuant to the order (*m*).

Judge must try the issue.

It may be stated here, that a Judge at Law trying an issue has no authority to decline trying it, or to refer it to another mode of trial, viz., by arbitration; but if the parties think proper to refer it to arbitration, and a reference is adopted by consent, the effect of that is to abandon not merely the direction to try the issue, but the whole proceeding (*n*).

Proceedings upon trial.

Rule that all the witnesses to a will shall be examined.

The course of proceeding upon the trial of an issue is, generally the same as that adopted in ordinary trials at law, except where the Court of Chancery has given any special directions upon the subject. It is, however, to be remarked, that, where a devisee seeks to establish a will of real estate, against the heir, the rule of the Court requires that the due execution of the will should be proved by the examination of all the attesting witnesses to it, who are in existence, or capable of being examined; and that the same course is also necessarily required upon the trial of an issue *devisavit vel non* (*o*), except when the circumstances are such, that, by the common rules of evidence, proof of the witness's hand-writing may be substituted for the testimony of the witness himself, as where the witness is dead or abroad, or is insane (*p*), or where, after diligent search, he cannot be found (*q*).

Reason of the rule.

' The rule of this Court, to have all the witnesses examined, is not by any means a technical rule; this proceeding to establish a will, aiming to say to the heir, that if the will shall be once established against him, he can never claim the devised property

ibid. It is stated in Mr. Smith's book, vol. 2, p. 80, that, in both the above cases, it appears that the Master had settled the issue, and certified that the defendant had not named an Attorney; that both orders were made on affidavit of the service of a notice of motion; and that, in addition to the direction stated in the report, they ordered that the defendant should consent to the trial of the issue at the next assizes to be holden for, &c., or, in default, the issue to be taken *pro confesso*.

(*m*) Anon. 20 Dec. 1813, cited 1 Newl. 352.

(*n*) Woodley v. Johnson, 1 Moll. 394.

(*o*) Townsend v. Ives, 1 Wils. 216; Ogle v. Cook, 1 Ves. 178; Bullen v. Michel, 2 Pri. 399; Bootle v. Blundell, 19 Ves. 494; Cooper Ch. Rep. 136.

(*p*) Powell v. Cleaver, 2 Bro. C. C. 503; Lord Carrington v. Payne, 5 Ves. 404; Bernett v. Taylor, 9 Ves. 381.

(*q*) James v. Parnell, Turn. and Russ. 417.

again, or, if the effect should not be, that the whole estate is gone from him, but establishing charges and incumbrances, to that extent his interest is bound for ever. This Court, therefore, before an heir shall be deprived of that opportunity which the law gives him, by repeated ejectments, to question again and again the validity of the will, until his conduct constitutes a case of that vexatious nature which induces the Court to grant an injunction, the Court, as it will know the whole truth, expects that all the witnesses shall be examined on one side or another,' and as an issue *devisavit vel non*, is a proceeding to try the actual fact 'with a view to the information of the Court, who must, to establish the will, know the whole, the case must go to trial without that prejudice which is the consequence of considering the witnesses to the will as the witnesses of either party, and *merely as a judicial proceeding to inform the Court* (r). This rule, however, as a general rule, applies only to the case of a Bill filed to establish a will, and an issue directed by the Court upon that Bill;—where the Bill was filed, by the heir at law, to restrain the devisee from setting up a legal estate as a bar to an ejectment upon the hearing, and an issue *devisavit vel non* was directed, in which the devisee was plaintiff; upon a motion for a new trial, on the ground that all the attesting witnesses had not been examined, it was held, that the case stood upon a ground directly opposed to that upon which the ordinary cases of Bills to establish wills rested, inasmuch as, so far from the heir at law being bound by the decree which he sought to obtain, it was he who sought to bind the devisee; and such was the form of his application, that if he failed, upon that issue, he would not be bound himself (s).

Examination of witnesses.

Applies only to suits to establish a will.

It may be mentioned in this place, that where an order for an issue directs all the witnesses to be examined, but the plaintiff declines to call some, conceiving his case to be made out, the Judge himself will call the others (t.)

Where party refuses to examine.

It has been before stated, that theordinary method of proving depositions taken in the Court of Chancery, upon the hearing of

Of reading depositions in the cause;

(r) Vide Lord Eldon's judgment, in Bootle v. Blundell, 19 Ves. 404.

(s) Tatham v. Wright, 2 R. & M. 1.

(t) Groome v. Chambers, 2 Mont. & Ayel. 742.

Of reading Depositions in the cause.

a cause in another Court, is by proving an examined copy of the Bill and answer (*t*), which is done for the purpose of laying a foundation for the introduction of such evidence, by shewing that there has been matter in issue between the parties, but that such rule has gradually been relaxed, and, in directing an issue to be tried at law, the Court will order the depositions taken in the cause, to be read at the trial of the issue, so as to dispense with the strict proof, which would otherwise be required, of the Bill and answer (*u*). The object of the Court, however, in making such an order, is merely that of dispensing with the strict legal proof of the record (*x*), and it is not intended to authorize the reading of the depositions of witnesses in cases in which the Court of Law would not admit them to be read upon proof of the record, in the ordinary way; *i. e.* unless proof be given that the witness is dead, or abroad, or otherwise unable to attend; it, therefore, generally adds to the order a direction, that the depositions of the witnesses shall be read at the trial of the issue, in case such witnesses or either of them shall be dead at the time of the trial, or shall be proved, at such trial, to be in such state of health as not to be capable of attending the trial (*y*).

depositions not read unless witness is dead,

—or incapable of attending;

admissibility of such depositions may be determined by the Judge at the trial,

It is to be remarked, that the effect of such an order is to leave the question, as to the admissibility of the depositions, to the determination of the Judge before whom the issue is tried, who will require strict proof, before he admits the depositions, of the death of the witness, or of his inability to attend. It is to be remarked, that in *Jones* v. *Jones* (*z*), a motion was made, before Lord Thurlow, for leave to read the deposition of a witness in the cause, on the ground of his age or inability to attend, but that his Lordship thought the application should be made to the Judge who tried the cause, and refused to make any order upon the subject. It seems, however, that there is no absolute rule requiring that the inability of a witness to attend, shall be left to the decision of the Judge at *nisi prius;* the fact of a witness's capacity being equally within the provision of the Court directing the issue; where, therefore, the Court can be satis-

—or by this Court.

(*t*) Ante, p. 426.
(*u*) Ante, p. 427.
(*x*) Gordon v. Gordon, 1 Swanst. 170.
(*y*) Palmer v. Lord Aylesbury, 15 Ves. 176.
(*z*) 1 Cox. 184.

fied that the question of the ability or inability of the witness to attend, can have but one conclusion, it will itself decide it, without imposing upon the party the necessity of trying that fact before the Judge at *nisi prius* who would be the person to try it, and not the jury. This principle was laid down and acted upon by Lord Eldon, in *Corbett* v. *Corbett* (*a*), who directed the depositions of two witnesses who were proved, by affidavit, to be of such ages and state of health, as to be unable to travel with safety to the assize town, to be read at the trial of the issue, and also the depositions of such other persons as should be proved at the trial to be dead or unable to attend.

Of reading Depositions.

In that case, however, his Lordship accompanied the order with a direction, that if the defendant should choose to examine the witnesses, upon interrogatories, in the meantime, he should be at liberty to do so.

In a recent case, where witnesses had been examined in the cause, and upon the hearing an issue was directed, but before the trial the plaintiff in the issue died, having appointed one of the witnesses who had been examined, his executrix, whose name and that of her husband were in consequence substituted for that of the testator, as plaintiff in the issue, the Vice-Chancellor ordered that the depositions of the executrix in the cause should be read at the trial of the issue, on the ground that, if she had died her depositions would have been admissible, and that her becoming plaintiff was tantamount to her death (*b*).

Where a witness after examination becomes interested,

Where a witness who has been examined in a cause, and afterwards *viva voce* upon the trial of an issue, dies, and a new trial of the issue is directed, not only his depositions in the cause may be read at the new trial, but what he swore at the former trial, may be given in evidence (*c*).

—or dies after trial.

The rules with regard to the examination of witnesses *de bene esse*, with a view to using their depositions upon the trial of an issue (*d*), as well as the admissibility of such depositions upon trials at law, have been before discussed (*e*). It is to be

Where depositions have been taken *de bene esse*.

(*a*) 1 V. & B. 335.

(*b*) Andrews v. Lady Beauchamp, 7 Sim. 65.

(*c*) Coker v. Farewell, 2 P. Wms. 563.

(*d*) Ante, 512.

(*e*) Ante, 550.

Of reading Depositions.

recollected, that when depositions *de bene esse* have been read at the hearing of a cause, it is a matter of course to order them to be read at the trial of the issue, notwithstanding an irregularity in the examination; and that the Court will not discharge the order, on the ground of such irregularity, although the party complaining of it, did not know of the irregularity in question till after the hearing, and the time was very short between the publication of the depositions and the hearing of the cause, as the party complaining of the order might have applied for time to enable him to examine whether the depositions had been regularly taken (*f*).

Party interested allowed to attend trial.

A person who is interested in the result of an issue, but who refuses to be a party to it, may, nevertheless, be allowed to attend the trial by counsel (*g*). He will, in such case, be included in the common order for the production of documents (*h*).

Judge's certificate.

After the trial has been had, the Judge, before whom it has been tried, certifies how the verdict was found, but it is not usual to enter up judgment on the verdict (*i*). If any special

Postea.

circumstances occur at the trial, which the Judge may think it right to report to the Court, he indorses it on the *postea*, for which purpose it is the habit of the Court, in ordering an issue, to direct that if the substance of the issue is found, but with some special circumstances, which may be material in measuring the extent of relief to be given on further directions, that matter should be indorsed on the *postea* (*k*).

Bill of exceptions will not lie.

It may be mentioned here, that, upon the trial of an issue, a Bill of exceptions for an alleged misdirection of the Judge, will not lie, but the regular course is to apply to the Court which directed the issue, for a new trial. In *Armstrong* v. *Armstrong* (*l*), however, a Bill of exceptions was tendered, and signed by the Judge, and the objection to its regularity having been waived, it was argued and decided upon in the Exchequer Chamber.

(*f*) Gordon v. Gordon, 1 Swanst. 166; ante, p. 553.

(*g*) Pindar v. Smith, Mad. & Geld. 48.

(*h*) Ante, p. 732.

(*i*) 1 Newl. 352.

(*k*) White v. Lisle, 3 Swanst. 342, 345.

(*l*) 3 M. & K. 45.

Postea.

After issue tried, plaintiff cannot dismiss his Bill.

It has been before stated, that, after the trial of an issue, a plaintiff cannot move to dismiss his own Bill with Costs, although he might have done it before the trial actually took place (*m*).

Plaintiff may be nonsuited.

It seems, that the plaintiff in an issue may suffer a ***nonsuit***, and that, if he does so advisedly, in consequence of any unforeseen occurrence at the trial, which would have rendered further proceeding with it unsafe, the Court will grant him a new trial, notwithstanding the nonsuit (*n*).

New trial. Motion for, must be made to the Court.

If the party, against whom the verdict is found, is dissatisfied with it, and wishes for a new trial, he must make an application for it to this Court, in which respect the practice upon issues differs from the practice upon actions at law brought under the direction of the Court, a new trial in which must always be moved for in the Court in which the action is brought (*o*).

Reason of the distinction between actions and issues.

The reason of this distinction is laid down, by Lord Eldon, to be, that if this Court thinks proper to consider the case upon the record, as fit to be governed by the result of a trial, the review or propriety of which belongs to a Court of Law, the opinion of a Court of Law is sought in such a form that it is regarded as conclusive, whether the judgment is obtained upon a verdict or in any other shape; but upon an issue directed, this Court reserves to itself the review of all that passes at law; and one principle upon which the motion for a new trial is made here, and not to the Court of Law, is, that this Court regards the Judge's report, with a view to determine whether the information collected before the jury, together with that which appears upon the record, is sufficient to enable it to proceed satisfactorily, to which it did not conceive itself competent previously (*p*).

Difference in practice between Courts of Equity and Courts of Law.

The consequence of the principle above laid down, is, that there is a material difference between Courts of Law and

(*m*) Ante, p. 356.

(*n*) Richards v. Symes, 2 Atk. 319.

(*o*) Fowkes v. Chadd, 2 Dick. 576.

(*p*) Bootle v. Blundell, 19 Ves. 500.

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Courts of Equity, in the rules by which they are guided in granting new trials. 'At Law, the rule on motions for new trials is, that if a verdict is given on evidence fairly, according to proper notice, and the Judge does not report that he is dissatisfied with it, or that it was against evidence or new answers to evidence, (for the parties are supposed to come prepared to support the characters of the witnesses on either side,) it will be supported; but this Court directs issues to be tried at law, to inform the conscience of the Court as to facts doubtful before, and therefore expects, in return, such a verdict, and on such a case, as shall satisfy the conscience of the Court to found a decree upon. If, therefore, upon any material or weighty reason, the verdict is not such as to satisfy the Court that it ought to found a decree upon it, there are several cases in which this Court has directed a new trial for further satisfaction, notwithstanding it would not be granted in a Court of Common Law, because it is *diverso intuitu*, and because the Court proceeds on different grounds (q).'

Object of Courts of Equity in granting issues.

New trial granted, where verdict is not sufficient to satisfy Court;

Acting upon this principle, the Court will grant a new trial, not only in cases where the verdict is against evidence, but it will nicely balance the evidence on both sides; and where it finds that the verdict is contrary to the *weight of evidence* it will direct the issue to be tried over again; thus, where two issues were directed, and both found for the plaintiff, and the Judge certified that he was satisfied with the verdict on the first issue, but though there was evidence on the second issue for the plaintiff, he thought the weight of evidence was for the defendant; Lord Hardwicke directed the second issue to be tried again, and said that the Court, in this respect, will go further than Courts of Law can, for if a verdict is not against evidence, (as the verdict upon that issue was not,) a Court of Law cannot grant a new trial; but a Court of Equity will, in order to have justice done: for the verdict must be such as will satisfy the conscience of the Court (r).

though it would not be granted by Courts of Law,

where verdict contrary to weight of evidence.

It is to be remarked, that, in the above case, the Judge who tried the cause, certified that he was satisfied with the

Secus where Judge certifies that he is satisfied.

(q) Stace v. Mabbot, 2 Ves. 552. 1 Amb. 210; Cleeve v. Gascoigne,
(r) Lord Faulconberg v. Peirce, ib. 323.

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verdict on the first issue, and that no new trial was directed upon that issue; and it seems to be the general principle acted upon by the Court, that if the application rests solely on the ground, that the verdict given by the jury was against the weight of evidence, and the Judge states that, upon the whole, he is not dissatisfied with that verdict, which is the usual form in which Judges intimate their opinion that the verdict ought not to be disturbed, the Court will not direct a new trial (*s*).

—unless on production of new evidence;

The Court will, however, even in that case, grant a new trial upon the production of new evidence, which was not before the jury upon the original trial (*t*). So if, after a trial, a witness be convicted, of perjury, or a party, of forgery, this will be considered as a good ground for a new trial (*u*). The Court, however, will not set aside a trial at law for any matter which might have been made use of at the trial (*x*), or where it is of opinion that the evidence, though newly discovered, will not afford a foundation for a different verdict (*y*).

—or conviction of a witness or party of perjury or forgery;

—or on the ground of surprise;

Where it can be shewn, that a party has been taken by surprise, and evidence produced at the trial, which he could have no reason to expect would be produced, the Court has directed the issue to be tried again: thus if, after an issue is directed, the plaintiff obtains an order *exparte* to strike out the name of a co-plaintiff, and makes use of him as a witness, and has a verdict, the Court will set aside the trial (*z*).

So where, at the trial of an issue, on a question of legitimacy, a witness was called to prove a fact, (shewing that there might have been access between a husband and wife at a particular time and place,) which witness had not been examined in a suit in the Ecclesiastical Court, to which the mother of the child whose legitimacy was disputed was a party, and in which his evidence would have been material to her, nor was any attempt made by her in that suit to establish the case of

(*s*) Gibbs v. Hooper, 2 M. & K. 355.

(*t*) Ibid.

(*u*) Tilley v. Wharton, 2 Vern. 378; vide etiam Coddrington v. Webb, ib. 240; Sewel v. Freeston, 1 Cha. Ca. 65.

(*x*) Curtess v. Smallridge, 1 Cha. Ca. 23, 2 Freem. 178; Montgomery v. Attorney-General, 9 Mod. 388.

(*y*) Colgrave v. Juson, 3 Atk. 197.

(*z*) Exton v. Turner, 2 Cha. Ca. 80; vide etiam Willis v. Farrar, 3 Y. & J. 264.

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access, which his testimony went to make out, the Lord Chancellor, (Lord Lyndhurst,) held that the testimony of this witness was a surprise upon the party against whom it was produced, and its accuracy being impeached by affidavit, he directed a new trial of the issue (*a*).

—or of fraud.

The Court will also grant a new trial in cases in which a fraud has been practised upon the party applying.

Secus because party was not apprised of a particular evidence;

But although surprise or fraud is in general considered a sufficient ground for directing a new trial, the Court has refused to grant a new trial, upon a mere suggestion, that the plaintiff was not apprized of a particular evidence which was made use of at the trial, and, therefore, was not prepared to answer it; because it appeared, that the evidence by which the plaintiff was surprised, was that of a witness who was brought to swear that one of the most material witnesses for the plaintiff, was not in England at the time when the transaction to which he deposed was alleged to have taken place, and it was proved, by affidavit, that, a fortnight before the trial took place, notice was given to the plaintiff of the intention of the defendant to prove that the witness was abroad, which, though it was not so particular as to point out the very place where he would be shewn to be, was held, by Lord Hardwicke, to be sufficient notice to the plaintiff to prepare to encounter the evidence (*b*).

—if he had notice of the general nature of the evidence.

After plaintiff has suffered nonsuit, *semble*.

It is to be observed, that, besides the general ground above stated for refusing the new trial, his Lordship held, that if the plaintiff's counsel had been of opinion, that there was evidence they were not apprized of, and too strong for them to encounter, they might have advised him to suffer a nonsuit, and then he might have come back to this Court for further directions, who would have ordered another issue at law, notwithstanding the nonsuit (*c*).

New trial not granted upon new evidence.

It may be remarked, in this place, that as it is the rule of the Court, that it will not grant a new trial upon the production of new evidence, unless it is shewn that there has been some

(*a*) Gibbs v, Hooper, 2 M. & K. 353.

(*b*) Richards v. Symes, 2 Atk. 319.

(*c*) Richards v. Symes, 2 Atk. 319, 321.

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—where party himself in possession of evidence but did not produce it;

surprise or fraud upon the party applying (*d*); still less will it do so where the party is in possession of the evidence, but either in the exercise of discretion or from neglect, does not produce it at the trial (*e*); or where it can be shewn that, though he was not in possession of it himself, he had full notice that it was in the power of the other side to produce it; upon this ground, the circumstance of evidence having been made use of at the trial of an issue, which was discovered after the answer of the defendant was put in, the consequence of which was, that the verdict was contrary to the answer, and to the true sense and meaning of the issue, was not held a sufficient reason for directing a new trial, there having been no surprise upon the party applying, who, before the trial, had opposed a motion made by the other party, for the express purpose of having the trial postponed, in order that the issue might be rectified (*f*).

or was aware the other side could produce it.

Party producing evidence which is a surprise upon the other, not allowed a new trial, although verdict against the evidence.

With reference to this subject, it may be observed, that where a party, upon the trial of an issue, produces evidence which is a surprise upon the other party, and which would have been sufficient under other circumstances to entitle him to the verdict, he will not be permitted, although the jury find against such evidence, to have a new trial; thus, where a plaintiff had represented himself, in his Bill, as entitled to the tithes of a particular parish, without noticing a district which was part of the parish, but had of late years been considered as a distinct parish, in answer to which the occupiers set up moduses applying to the whole parish, and issues were directed to try the validity of such moduses, at the trial of which issues the plaintiff proved that the district alluded to was part of the parish, and that the moduses did not prevail there, but the jury found, notwithstanding, in favour of the moduses,—the Vice Chancellor, (Sir John Leach,) refused a motion for a new trial, which was made on the part of the plaintiff, on the ground of its being contrary to the evidence, ' because such evidence, so given by the plaintiff, was altogether a surprise upon the defendants, and was inconsistent with the case made by the

(*d*) Standen v. Edwards, 1 Ves. Jun. 133.

(*e*) Ibid.

(*f*) Legard v. Daly, 1 Ves. 192.

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plaintiff in the pleadings in equity, and did not in any manner affect the merits of the case in equity between the plaintiff and defendants, and was calculated to defeat the trial of such merits, and to disappoint the intention of the Court in directing the issues' (g).

Party setting up forgeries, not allowed to say that they are immaterial.

As the Court will not grant a new trial, upon the mere production of new evidence, unless it can be shewn that there was a fraud or surprise upon the party applying, so it will not permit a party who has practised a fraud, and set up documents which were proved to be forgeries, and by that means prejudiced his own case, to say that, whether the documents were true or false, there is other evidence which makes them immaterial (h)

Absence of material witness a ground for a new trial.

The Court will grant a new trial, on the ground that a material witness for the party was absent from the trial, but it will not do so on the mere ground that the testimony of the witness who was absent, would only corroborate that of several others to a fact,—it must be shewn that there is something particular in his evidence which is of importance, and that it was not in the power of the party to have the trial put off (i)

Misdirection of the Judge.

A new trial may also be directed, on the ground of a misdirection of the jury by the Judge who tried the issue (k); so if the Court feels satisfied, from the report of the Judge, that the points in the case have not been distinctly presented to the jury, it will, without entering into the question whether the verdict was or was not satisfactory upon the facts, direct a new trial (l).

Misconduct of the jury.

Irregularity in the trial.

The Court will also order a new trial of an issue, where it sees reason to be dissatisfied with the conduct of the jury (m), or where there has been an irregularity in the trial. It has been said, that to induce this Court to set aside a former trial of an issue for an irregularity in the trial, and for that cause to grant a new one, there must be ordinarily a certificate in writing from the Judge or Court before whom it was tried, of a

(g) Carrington v. Jones, 2 S. & S. 135.

(h) Kemp v. Mackrell, 2 Ves. 580.

(i) Cleeve v. Gascoigne, 1 Amb.

(k) Cleeve v. Gascoigne, ubi supra; Bearblock v. Tyler, Jac. 571.

(l) O'Connor v. Cook, 8 Ves. 536.

(m) E. I. Comp. v. Bazett, Jac. 91.

verdict against evidence, or other misbehaviour of the jury, or such like (*n*); this, however, does not appear to be the present practice, and frequent instances occur in the books, where the Court has set aside the verdict in such cases, without any such certificate by the Judge, and even in opposition to it, where he has expressed himself satisfied with the verdict (*o*).

New Trial.

A new trial may also be granted, because evidence which was tendered was improperly rejected, though it seems that the Court will not direct a new trial upon the latter ground only, if it is satisfied that the verdict is right, upon considering all the evidence, including that which was rejected (*p*). Where, also, an application is made to the Court to grant a new trial, on the ground of an improper summing up by the Judge, the Court will not accede to it, if it is satisfied that, upon the evidence as it stands, the jury could not, if the case had been properly summed up, have given a different verdict (*q*).

—or the improper rejection of evidence. *Secus* where Court is satisfied that verdict is right.

It is to be observed, that if the matter relates to the right to land, the Court will frequently direct new trials of issues, even in cases in which the issue has been properly tried, and the verdict is satisfactory upon the evidence, the practice of the Court being adverse to making a decree to bind the inheritance, where there has been but one trial at law (*r*). This is the case, especially where the object is to establish a will against an heir at law; for as the heir, but for the interference of the Court, would be entitled to take the successive opinions of juries, by new ejectment, this Court will not bind him by one trial only, but will direct a second (*s*); and if it happens, that one verdict goes one way, and the other another way, then the Court will ordinarily, on motion, order a third trial, which is commonly

New trials directed when verdict satisfactory; if the matter relates to land.

(*n*) Prac. Reg. 263.

(*o*) Vide E. I. Comp. v. Bazett, Jac. 91.

(*p*) Hampson v. Hampson, 3 V. & B. 41; Minor canons of St. Paul's v. Morris, 9 Ves. 155; Bootle v. Blundell, 19 Ves. 500, 503; Barker v. Ray, 2 Russ. 63; Pemberton v. Pemberton, 11 Ves. 50.

(*q*) Tatham v. Wright, 2 R. & M. 31; vide Ringrose v. Todd, 12 Pri. 650; Barker v. Ray, ubi supra.

(*r*) Earl Darlington v. Bowes, 1 Eden, 271; Stace v. Mabbot, 2 Ves. 353; vide Edwin v. Thomas, 2 Vern. 75; in which it was thought to be a sufficient ground for a new trial, that the result concerned all the copyholders of a manor; vide etiam Locke v. Colman, 2 M. & C. 42.

(*s*) Winchilsea v. Wauchope, 3 Russ. 441.

42.

New Trial.

conclusive (*t*). But where there was verdict against verdict, and a third trial was prayed by him for whom the first went, and it appeared to the Court, by affidavit, that, since the last trial, he had caused a bank of earth to be dug away, and with it certain old posts which were fixed in the ground, and were supposed to have been the bottom of park pales, dividing the land in question so that the jury could not now have any view of it, the Court, for this cause, denied another trial (*u*).

Court will not bind the inheritance by one or two trials only.

But in the case of a will, even after two trials, in both of which the verdict has been in favour of the will, the Court, where it was not satisfied with the manner in which the last trial was conducted, has directed a third trial (*x*); and that, even though it did not appear from the Judge's report, that there was any reason to disturb the verdict. It seems, also, that even after three trials, the Court will, if it sees reason to be dissatisfied with the verdict, grant a fourth. An application for this purpose, was made to the Court in *Pemberton* v. *Pemberton* (*y*), and no objection was raised to the power of the Court to direct a fourth trial, though the result of the case was, that Lord Eldon, being satisfied with the verdict, refused the motion. In general, however, the Court will not direct a new trial after a third, unless upon some special ground: and, in *Attorney-General* v. *Montgomery* (*z*), Lord Hardwicke said, that where there had been two trials, the last of which was at bar, this Court has suffered the last to prevail; and that to lay down a rule that there must be three, would be attended with great expenses. In *the Minor Canons of St Pauls* v. *Morris* (*a*), after two trials, at bar, a third trial was refused, although evidence had been rejected at the last, which the Court thought ought to have been received; and, in *Bates* v. *Graves* (*b*), the Court refused a third trial of an issue as to the validity of a will of real estate, although neither of the former trials had been at bar.

New trial may be had after third verdict, if Court dissatisfied;

but not usually directed.

Refused after second when trial at bar.

Where neither of the trials have been at bar.

It may be observed, that, even in the case of suits to bind

(*t*) Prac. Reg. 263.
(*u*) Ibid.
(*x*) Ibid.
(*y*) 13 Ves. 290.
(*z*) 2 Atk. 378, cited 1 Ves. 29.
(*a*) 9 Ves. 155.
(*b*) 2 Ves. jun. 287.

New Trial.

the inheritance, the Court will not set aside the verdict, and grant a new trial, merely because it is desired, without any ground laid for it (*c*); it will, however, in cases of that nature, where the matter is of great importance, direct a second trial for the solemn determination of the matter, without setting aside the first verdict, the effect of which is, that the first verdict may be given in evidence upon the second trial, and will have its weight with the jury (*d*).

Second trial granted without setting aside first.

In such cases, it seems that the Court makes it a condition of granting a second trial, that the applicant shall pay to the other party the costs of the first (*e*).

upon payment of costs of the first.

Where a verdict upon a former trial is given in evidence upon a second trial, it is necessary for the person who gives it in evidence, to shew upon what title it was obtained; and, on the other side, they are at liberty to shew on what kind of proofs it was given, which, if there is anything which impeaches the evidence, on which the first verdict was given, will be very material (*f*); and even where the person who is the guardian of an infant, party to an issue, has been guilty of *mal practices*, to obtain the verdict, that fact may be given in evidence, to impeach the verdict (*g*).

Party giving former verdict in evidence, to shew title upon which it was given, which may be rebutted, by shewing mal practice, &c.; even in the guardian of an infant.

All applications for new trials of issues directed out of the Court of Chancery, should be made by motion or petition, before the cause comes on for hearing upon further directions; and in *Attorney-General* v. *Montgomery* (*h*), Lord Hardwicke declared that, for the future, he would not answer a petition for a new trial, to come on at the same time with the case upon the equity reserved.

Application for new trial, should be made by motion or petition, before hearing on further directions;

In *Legard* v. *Daly* (*i*), Lord Hardwicke stated as a reason which weighed greatly with him, in refusing an application for a new trial, the length of time, (viz. five years and a half,) which had elapsed since the trial, which he said would be an objection

as speedily as possible;

(*c*) White v. Wilson, 13 Ves. 88.
(*d*) Baker v. Hart, 3 Atk. 542.
(*e*) Ibid; vide etiam Edwin v. Thomas, 1 Vern. 489.
(*f*) Ibid.
(*g*) Ibid.
(*h*) 2 Atk. 378.
(*i*) 1 Ves. 192.

New Trial.

even in Courts of Law; and he observed that, although it had not been set down till lately upon the equity reserved, it could not be said that the other side should not have applied for a new trial, for perhaps the defendant might have no reason to set it down.

—must be to the Judge who directed the issue.

Formerly, it was not absolutely necessary, to make the application for a new trial to the Judge who directed the issue, and a motion for this purpose might be made before the Lord Chancellor, although the issue had been ordered upon a hearing before the Master of the Rolls (*k*); but, by one of the new orders, it has been directed, that every application for the new trial of any issue at law, directed by a Judge of this Court, be first made to the Judge who directed the same (*l*). It is to be observed, that the meaning of the above order has been held to be, that the motion should be made before the same *jurisdiction*, though the Judge may have been removed; thus, where an issue has been directed by the Vice-Chancellor, and he is afterwards promoted to the office of Master of the Rolls, the application must still be made in the Vice-Chancellor's Court (*m*). So, also, if an issue is directed by the Master of the Rolls or Vice-Chancellor, and either of those Judges afterwards become Lord Chancellor, the application must be made to the inferior jurisdiction, and not to the Lord Chancellor (*n*).

or to the individual holding the same office.

Lord Chancellor may hear aplications by way of appeal.

The Lord Chancellor has, however, authority to hear applications respecting new trials, by way of appeal from the Courts below, and if either the Master of the Rolls or the Vice-Chancellor refuse to make the order, it may be moved again before the Lord Chancellor (*o*); and so, if an order for a new trial is made by either of the Judges, the Lord Chancellor may entertain a motion to discharge it.

Order as to number of Counsel.

It may be mentioned, in this place, that in July, 1828, the Master of the Rolls (Sir John Leach,) stated, that the Lord Chancellor and the other Judges of the Court concurred in opinion, that it would be fit, in future, that not more than two Counsel should be employed in support of a motion for a new

(*k*) Pemberton v. Pemberton, 1 Ves. 50.

(*l*) Ord. 1828, XLVII.

(*m*) Footner v. Figes, 2 Sim. 319.

(*n*) Vide Reece v. Reece, 1 M. & C. 372.

(*o*) White v. Lisle, 3 Swanst. 342.

trial, and not more than the same number in opposition to it; and that he, the Master of the Rolls, had authority to declare, that such was thenceforward to be the rule of practice in each branch of the Court (*m*). It appears, however, that this rule has not been adhered to, and that, on several occasions since it was promulgated, more than two Counsel have been heard in the Lord Chancellor's Court in support of and against a motion for the new trial of an issue (*n*).

New Trial.

—not acted upon, *semble.*

Where a party wishes to move for a new trial, the course of proceeding is, to make an *exparte* application to the Court, to send to the Judge who tried the issue, for his notes of the trial. This application is not of course, but must be supported by a statement shewing a reasonable ground for questioning the verdict (*o*).

Application for Judge's notes; not granted of course.

It is to be noticed, that the form of an issue cannot be changed upon a motion for a new trial. If the party is desirous to question the form of the issue, he must do so by presenting a petition for a rehearing of the decree or order directing it (*p*). In *De Tastet* v. *Bordenave* (*q*), a petition for a rehearing was presented at the same time that a notice of motion was given for a new trial, and, upon the hearing of the petition, Lord Eldon said, that if it had been lodged before the trial, an application should have been made by motion to stay the trial; but that if the application for the rehearing was not made till after the trial, it came too late. In *White* v. *Lisle* (*r*), however, his Lordship permitted a petition for a rehearing to be brought on at the same time with a motion for a new trial.

Form of issue not changed upon application for new trial; but must be by rehearing.

Application for rehearing, within what time to be made.

After the issue has been tried, and the record completed by the addition of the *postea*, the cause, unless a new trial is moved for and granted, must be set down for hearing for further directions. For this purpose, a petition must be presented in the usual manner (*s*), and with the petition a copy of the de-

Further directions.

(*m*) 5 Russ. 23.
(*n*) Ibid.
(*o*) Morris v. Davies, 3 Russ. 318; vide etiam the Memorandum, Mad. & Geld. 58.
(*p*) White v. Lisle, 3 Swanst. 351; vide etiam Legard v. Daly, 1 Ves. 192.
(*q*) Jac. 516.
(*r*) Ubi supra.
(*s*) Vide post, Chap. XXVII.

Further directions.

cree must be left; and of the record and *postea* thereon, for the Judge (*t*). This, however, cannot be done after the trial of an issue or an action, until after the first four days of the term next after the trial have elapsed, in order that the party against whom the verdict has been found, may have an opportunity of moving for a new trial (*u*).

Hearing upon.

The cause then comes on in the regular course, when such final or other decree, as the cause calls for, will be pronounced.

Decision in accordance with verdict;

The decree of the Court is usually in accordance with the finding of the jury upon the issue, or, if there have been more trials than one, with the last verdict. The Court, however, will, even then, if it thinks that the issue as tried does not answer the purpose for which it was intended, direct a new issue, or new issues, in such form as may suit the justice of the case (*x*); and, in *Armstrong* v. *Armstrong* (*y*), the Master of the Rolls, (Sir John Leach,) without directing a new issue, decided at once against the parties in whose favour the verdict was found, and his Honor's decision was supported, upon appeal, by Lord Brougham; but it is right to observe that, in that case, the issues appear to have been so framed, that the verdict threw very little light upon the question which it was important to decide, and the whole matter was before the Court with sufficient precision to enable it to come to a decision without another reference to a jury.

unless Court thinks issues improperly framed.

May be upon oath of one witness against answer.

It may be remarked, in this place, that although, as we have seen, (*z*), the Court will not make a decree contrary to a positive denial, on oath, by the defendant's answer, upon the evidence of one witness only, but will, where the evidence of such witness is supported by corroborating circumstances, send the matter to an issue (*a*), it will nevertheless make a decree upon the verdict, although it appears, by the *postea*, that only one witness was examined (*b*).

(*t*) 2 Harr. edit. Newl. 508.

(*u*) 1 Newl. 357.

(*x*) Vide Blackburne v. Gregson, 1 Bro. C. C. 423, 424.

(*y*) 3 M. & K. 45.

(*z*) Ante, p. 404.

(*a*) Ante, p. 506.

(*b*) In De Tastet v. Bordenave, Jac. 521; Lord Eldon said, that it is difficult to know on what principle the Court proceeds in such cases; but his Lordship, probably did not recollect the rule above stated, that, before an issue is

Further directions. — If issue has not been tried, Court will direct trial to take place.

If, after an issue has been directed, the cause is brought on for further directions, and it appears that the parties have not gone to trial of the issue, the Court, if it is dissatisfied with the grounds upon which the trial of the issue was not suffered to take place, will still direct it to be tried; thus where an issue was directed to try the validity of a debt claimed against a testator's estate, and, at the trial of the issue, the executor entered into a compromise with the debtor, subject to the opinion of the Court, and upon the case coming on again for hearing, the Master of the Rolls was of opinion, that the compromise was improper, he directed the parties to proceed to try the issue, the executor paying all the costs of the former proceedings at law (*c*).

Effect of commise;

So if it appears that the Judge, before whom the issue was to be tried, declines trying it, and refers it to arbitration, the Court will make an order to have the issue tried, if the party dissatisfied with the award applies for a new trial (*d*). The case, however, will be otherwise where the reference is adopted by consent of both parties (*e*).

—of reference to arbitration.

Costs of issues.

The costs of a feigned issue do not follow the verdict as a matter of course, but the finding of the jury is returned back to this Court, and the costs are in the discretion of the Court (*f*).

Cannot be obtained upon motion;

These costs cannot be obtained upon motion, but the cause must be set down upon further directions (*g*); and where a person, not a party to the suit, went before the Master under the decree, claiming to be a party interested, and, upon an issue directed, obtained a verdict, it was said that if the Court decided against a new trial, he must be made a party, for the purpose of bringing him before the Court upon further directions (*h*).

follow the event.

But although the costs of a feigned issue, directed by this

granted in such cases, the evidence of the one witness must have been supported by corroborating circumstances.

(*c*) Legh v. Holloway, 8 Ves. 213.

(*d*) Woodley v. Johnson, 1 Moll. 394.

(*e*) Ibid.

(*f*) 2 Harr. ed Newl. 570.

(*g*) Standen v. Edwards, 1 Ves, jun. 135.

(*h*) Ibid.

Costs-

Court, are said to be discretionary, the general rule of the Court in awarding them is, that they follow the event, and are given to the party who prevails at law (*i*). This rule, however, is liable to exceptions: thus in the case of a Bill to establish a will against an heir at law, he has a right to be satisfied how he is disinherited, and if an issue is directed to try the will, he will have his costs, although the will is established, unless there are any peculiar circumstances in the case which will induce the Court to refuse them (*k*). The most usual case for refusing an heir at law his costs of an issue, is where he sets up insanity and fails to prove it; in such cases, the heir is not considered entitled to his costs of the issue (*l*). In some cases, the Court has gone the length of compelling an heir to pay the costs of an issue, but it must be a very strong case to induce the Court to do so; such as the spoliation or secreting of a will (*m*), or where he vexatiously contests the will, by setting up a case of insanity, knowing that the devisor was perfectly sane (*n*). The Court will, however, on the ground of vexation, decree the costs of an issue against an heir who fails where he himself has filed the Bill to set aside the will for insanity, instead of proceeding by ejectment (*o*), and it seems that, even where the heir could not have proceeded by ejectment, by reason of outstanding terms &c., and the Court, for that reason, dismisses the Bill without costs, it still will order him to pay the costs of the issue (*p*).

Exceptions in the case of an heir at law.

In what cases heir will not have his costs

—will be compelled to pay them.

Costs of new trial.

When a new trial of an issue is directed, the Court usually reserves the consideration of the costs of the former trial (*q*); but, in *Standen* v. *Edwards* (*r*), an order was made that the defendants, who were infants, on whose behalf the application for the new trial was made, might pay the costs of the former trial

(*i*) Beames on Costs, 234; Prac. Reg. 152.

(*k*) Berney v. Eyre, 3 Atk. 387; Wright v. Wright, 5 Sim. 449; vide etiam Webb v. Claverden, 2 Atk. 424; Crew v. Jolliff, Prec in Ch. 93.

(*l*) White v. Wilson, 13 Ves. 92; Smith v. Dearman, 3 Y. & J. 278.

(*m*) Berney v. Eyre, 3 Atk. 387.

(*n*) White v. Wilson, supra.

(*o*) Webb v. Claverden, 2 Atk. 424; Scaife v. Scaife, 4 Russ. 309.

(*p*) Tatham v. Wright, 2 R. & M. 1, 32.

(*q*) Beames on Costs, Appx. XV. 369.

(*r*) 1 Ves. jun. 135.

before they proceeded to a new trial; and a similar order was made in *Edwin* v. *Thomas* (s). It is to be observed, however, that in the first of the above cases, the order appears to have been made as a matter of indulgence, (after the refusal of the application in the first instance (t),) upon the defendant's own allegation, that they had mismanaged their case upon the first trial, and that, in the second case, the new trial was directed, not because the Court was dissatisfied with the former verdict, but upon the ground that the cause was alleged to be of value, and to concern all the copyholds in the manor; and it is presumed, that a similar order would be made in any case in which the Court directs a second trial without setting aside the first (u).

Costs.

It may be observed that, in *White* v. *Lisle* (x), where an issue was directed to try a modus set up by the defendants, and there was a verdict in favour of the modus, Lord Eldon directed two new trials, on the ground of misdirection, but that the result was always the same, and that his Lordship, upon further directions, dismissed the plaintiff's Bill giving the defendants, who were plaintiffs in Equity, the costs of the last trial at law but no costs of the two former trials. In *Clifton* v. *Orchard* (y), however, where a Bill was filed to establish a modus, and two verdicts were found for the plaintiffs, the costs of both trials at law were given to the plaintiffs.

Where there are more new trials than one.

In the above case of *White* v. *Lisle* (z), Lord Eldon also gave the defendants the costs of all the motions for new trials, except the costs of one which was made before the Lord Chancellor, by way of appeal from the Vice-Chancellor, who had refused the application.

With reference to the costs of the motion for a new trial, it may be mentioned, that, where the motion is dismissed, the costs are not costs in the cause, and cannot be recovered by

Costs of motion for new trial.

(s) 1 Vern. 489.
(t) Vide 1 Ves. jun. 135, S. C.
(u) Supra, p. 755.
(x) 3 Swanst. 342; Beames on Costs, 234, n.
(y) 1 Atk. 609.
(z) Beames on Costs, 324 n.; vide etiam 3 Swanst. 356; where it will appear, that the order was somewhat different from the statement of it by Mr. Beames, on the authority of Mr. Tinney.

Costs.

the successful party, unless the motion is expressed to be dismissed with costs (*b*).

Where plaintiff gives notice of trial but does not proceed.

Where the plaintiff in an issue gives notice of trial, but does not proceed, the costs for not going to trial should be moved for in this Court, and not in the Court of Law (*c*). The proper course, in such cases, is to apply, by motion, that the plaintiff may proceed to trial at the next assizes, or, in default, that the issue may be taken *pro confesso* (*d*).

Advance out of fund in Court, to defray the costs of trial.

Where, upon an inquiry as to the next of kin of an intestate, the Master reported in favour of the claims of two individuals, and disallowed those of others; and some of the disallowed claimants took exceptions to the Master's report, upon the hearing of which an issue was directed for the trial of their claims, in which the disallowed claimants were to be plaintiffs, and the allowed claimants were to be defendants;—upon both parties presenting a petition praying each to have a sum of £500 advanced, out of the estate of the testator, to defray the expenses of the trial, the Court refused to make the advance to the disallowed claimants, but directed the £500 to be paid to the allowed claimants, upon their giving security, to be approved by the Master, to account for it as the Court should direct (*e*).

Sect. II.

Actions at Law.

Bill retained with liberty to bring actions at Law.

It has been before stated, that the Court, in making a decree for the dismissal of the plaintiff's Bill, will sometimes do so without prejudice to the plaintiff's right to proceed at Law (*a*), and that it will also, where the plaintiffs' right to equitable relief, depends upon a legal title, retain the Bill for a certain period, giving the plaintiff liberty, in the mean time,

(*b*) White v. Lisle, 4 Mad. 214, S. C.; vide etiam Devie v. Lord Brownlow, 2 Dick. 796.

(*c*) Anon. 2 P. Wms, 68.

(*d*) Ante, p. 740.

(*e*) Gregg v. Taylor, 4 Russ. 279.

(*a*) Ante, p. 639.

to bring an action for the purpose of establishing his right at Law, in order to found the equitable relief (*b*); in which cases the Bill will stand dismissed, unless the action is brought within the time limited, further directions being reserved only in the event of a trial taking place (*c*). There are many other cases, however, in which the Court will order an action to be brought at Law, instead of directing an issue, and this it does whenever it thinks proper to consider the case upon the record as fit to be governed by the result of a trial, the review or propriety of which belongs to a Court of Law (*d*). Thus 'Heirs at law entitled to estates of which their ancestors were seized, *though only in Equity*, and therefore not having the means of proceeding at Law, may come into Equity merely to recover the possession of those estates, and have the deeds delivered up, the course has been to file a Bill stating the reasons they cannot bring an ejectment; mortgages, outstanding terms, &c., and in general cases, this Court, as it cannot try the validity of a will, sends that to be determined by the proper tribunal, and afterwards does what is right. The habit in doing this has been merely to direct the heir to bring his ejectment, providing that the defendants at law shall not set up a term, satisfied or unsatisfied, and a trial had in that way, under the control of a Court of Law, they come back for the accounts and deeds, &c., which course leaves all the incumbrances just as much incumbrances as if the possession had not been changed' (*e*).

In what cases directed.

Actions at law directed instead of issues.

By heirs at law seeking to recover equitable estates.

The above is cited as one out of many instances in which the Court will direct an action at law, instead of an issue; and it may be laid down as a general rule, that wherever the foundation of a claim is a legal demand, and the question whether a new trial should or should not be had, can be discussed with more satisfaction in a Court of Law than in a Court of Equity, the Court of Equity will adopt the course of directing an action; for, as we have before seen, an action at Law differs from an issue in this point, viz., that, in the former, the mo-

General rule as to directing actions instead of issues.

(*b*) Ante, p. 639.

(*c*) Ante, p. 640.

(*d*) Vide Bootle v. Blundell, 19 Ves. 500.

(*e*) Per Lord Eldon, Pemberton v. Pemberton, 13 Ves. 298.

In what cases directed.

New trial must be in the Court in which the action is brought;

tion for a new trial must be made before the Court in which the action is brought, whilst in this Court the motion must be made before the Judge who directed the issue (*f*).

It is to be remarked, that the rule that new trials of actions brought under the direction of the Court must be moved for in the Court wherein the action is brought, applies even to cases in which the Court has given special directions with regard to the trial, such as for the examination of the parties, &c. (*g*).

Form of action.

In directing an action at Law, the Court always directs it to be brought in such a form that the result shall be regarded as conclusive (*h*). It also provides for a satisfactory trial, by restraining the parties from setting up any legal obstacles to the fair trial of the case, such as outstanding terms (*i*), or the Statute of Limitations (*k*), or a bankruptcy (*l*).

Special directions, —as to setting up legal obstacles,

—as to admissions;

It will also order the parties to make such admissions at the trial, as may be necessary to bring the matter in dispute properly before the Court (*m*), and give the same directions with respect to the examination of the parties, and the reading of depositions, and the production of documents, as are given upon directing issues (*n*). The reader's attention is here recalled to the distinction, in this respect, which has been before pointed out, between the cases where the production is required upon trials directed by this Court, and those in which the assistance of this Court is merely sought in the shape of discovery, to assist in a trial at law of an action commenced without the sanction of the Court (*o*). It is to be observed, in addition, that the Court will not, in a case where the Bill prays equitable relief, such as restraining the setting up of outstanding terms, or the Statute of Limitations, make such an order, upon motion, before decree, the rule of the Court being, that where a Bill seeks relief as well as discovery, the Court will not, upon motion, aid the plaintiff in proceeding at Law.

—as to examination of parties. Reading depositions.

Distinction with regard to directing the production of documents

Action not directed before decree where Bill prays equitable relief.

(*f*) Ante, p. 747.

(*g*) Exparte Kensington, Coop. Ch. Rep. 96.

(*h*) Bootle v. Blundell, ubi supra.

(*i*) Pemberton v. Pemberton, ubi supra; Stevens v. Praed, 2 Ves. jun. 519; Buxton v. Sidebotham, cited ib. n.

(*k*) Ibid.

(*l*) Ibid.

(*m*) Ibid.

(*n*) Ante, p. 738.

(*o*) Ante, vide etiam Brown v. Thornton, 1 M. & C. 243; vide post interlocutory applications for production, &c.

without the authority of the Court under whose authority and control such a proceeding must be instituted (*p*).

Special directions.

Party setting up defence which he is ordered not to set up; committed for contempt.

Where a case was referred to an action at law, and it was ordered that the defendant should not insist upon a title set aside by the decree, and the defendant nevertheless did insist upon it, whereupon the plaintiff read the decree, but was nevertheless nonsuited,—he afterwards applied to the Court for a commitment of the defendant, and to be established in the possession, which was ordered (*q*). And even where no special direction was given as to not setting up a legal title, and the defendant in the action set up a legal title in trustees, whereupon the plaintiff was nonsuited, the Master of the Rolls upon petition ordered the defendant to pay the costs of the nonsuit (*qq*).

Parties to the action; other parties at liberty to attend.

Where directions are given to bring an action, as the action can only be between the parties who are interested in the legal estate, the Court, for the protection of those who are equitably interested, will make it part of the order that they shall be at liberty to attend the trial by Counsel, &c., to make such defence as they may be advised (*r*).

Effect of abatement of suit, by death of such parties.

It is to be remarked, that, in such cases, if an abatement in the suit occurs before the trial of the action, by the death of any of the defendants who are at liberty to attend the trial, the suit should be revived before the trial takes place, but it is otherwise where the abatement occurs by the death of a defendant who has no such liberty (*s*).

Proceedings after verdict must be in Equity.

The action is tried in the usual manner, and, after verdict, the cause should be set down for further directions, in the same manner as after the trial of an issue (*t*), and, in the meantime, no proceedings should be taken at Law in consequence of the verdict, except moving for a new trial, without the sanction of the Court. It is to be observed, however, that the hearing upon further directions is not the time when any mistake committed at the trial below can be rectified; and that

Mistakes in verdict not rectified in Equity.

(*p*) Vide Hylton v. Morgan, 6 Ves. 293; Aston v. Lord Exeter, ib. 289.

(*q*) Anon. 1 Ch. Ca. 267.

(*qq*) Bayley v. Morris, 4 Ves. 788.

(*r*) Vide the decree in Buxton v. Sidebotham, 2 Ves. jun. 521, n.

(*s*) Humphreys v. Hollis, Jac. 73.

(*t*) 2 Smith. Ch. Pr. 92.

Further directions.

where, upon further directions, the plaintiff applied to have the damages given by the verdict at Law increased, on the suggestion that interest was omitted to be given, through a mistaken supposition that it would be given in Equity, the Court refused to interfere with the verdict (*u*).

If mode of conducting action misconceived, application must be made to Chancery.

If in the course of an action directed by the Court, the mode is misconceived, the party should apply by petition, to enable the Court to do justice (*x*),

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Costs.

The consideration of the costs of an action at law, is generally reversed by the order directing or permitting the action, together with the other costs of the suit, till the cause comes on upon further directions, when the Court will make such order respecting them as the justice of the case requires. In general, however, the costs of the action follow the verdict, as in the case of issues (*y*).

Security for.

Where an action is directed to be brought in a Court of Law, and the plaintiff in the action resides abroad, the motion that he may give security for costs should be made in Equity (*z*).

Sect. III.

Cases for the Opinion of a Court of Law.

In what cases case will be directed;

discretionary in the Court.

As this Court, for the purpose of enabling it to come to a decision upon the matter before it, frequently requires the assistance of a jury upon matters of *fact*, for the same purpose, if a question of law arises, it will direct a case to be stated and sent to a Court of Common Law for its opinion (*a*).

May be directed by Master of the Rolls.

It may be observed here, that the sending a case to Law is always discretionary in the Court, and that an heir at law enjoys no peculiar privilege in that respect (*b*).

In *Horton* v. *Whitaker* (*c*), the Master of the Rolls (Sir

(*u*) Stevens v. Praed, 2 Ves. jun. 519.

(*x*) Holworthy v. Mortlock, 1 Cox. 141.

(*y*) Vide Stevens v. Praed, supra.

(*z*) Desprez v. Mitchell, 5 Mad. 87.

(*a*) 1 Newl. 554.

(*b*) Muddle v. Fry, Mad. & Geld. 270.

(*c*) 2 Bro. C. C. 88.

Nature of.

Lloyd Kenyon,) said, it was not competent for him, while sitting at the Rolls, to direct a case to be sent to the Court of King's Bench, though he had authority to do so in the case before him, as he was sitting for the Lord Chancellor. In this view of the case, the Vice-Chancellor would have the power of sending a case to a Court of Law, though the Master of the Rolls would not: this distinction, however, does not appear to exist at present; and, in *Lord Cholmondley* v. *Lord Clinton*(*d*), a case was sent, by Sir William Grant, (M. R.) for the opinion of the Court of King's Bench, which was there twice argued before the whole Court(*e*).

By whom drawn up.

When a case is directed to be sent for the opinion of the Judges, the practice is, for the plaintiff or the party on whose behalf the case is asked, to draw up the case; though it appears that, sometimes, the facts to be stated are set out in the order of the Court(*f*), and sometimes it has been referred to a Master to settle the case in the first instance(*g*): in general, however, by the decree directing it, it is referred to the Master to settle, in the event only of the parties differing(*h*).

Sometimes facts stated by the Court.

Reference to the Master to settle; usually in the event of parties differing.

It is to be observed, that, in preparing a case, all the facts necessary to bring the matter into question should be stated, and that the questions must not be put in a speculative form, as the Courts of Law will not answer speculative questions(*i*). Upon this ground, where a case was sent for the opinion of a Court of Law, as to 'whether, upon a conveyance to a purchaser being executed by a particular person, without the concurrence of another, the purchaser acquires certain rights and remedies,' the Court of Law refused to answer the question, and Lord Eldon directed the case to be altered to the proper form, which was done by stating an actual conveyance to the purchaser(*k*).

Case must not be speculative,

The Judges will also decline to answer questions as to rights which do not strictly come within the province of a Court of Law; thus, they will not answer cases as to trusts(*l*), there-

or upon rights which are not legal.

(*d*) 2 Mer. 171.
(*e*) 2 J. & W. 1.
(*f*) Asburnham v. Kirkhall, 1 Dick, 73; Harman v. Spotteswood, cited ibid.
(*g*) Ceal v. Ashurst, 2 Dick. 474.
(*h*) Prebble v. Boghurst, 1 Swanst. 313, n.; Vawser v. Jeffery, 2 Swanst. 275; Attorney-General v. Lloyd; Seton on Decrees, 354.
(*i*) Bliss v. Collins, 1 J. & W. 426.
(*k*) Ibid.
(*l*) Parsons v. Parsons, 5 Ves. 578; and vide Bayley v. Morris, 4 Ves. 788, 790.

Proceedings upon.

fore, a case upon the construction of a will as to equitable estates, should state the devises as legal ones (*m*).

Settlement of case.

Reference to Master.

When the case has been drawn and settled, the plaintiff's Solicitor sends copies of it to the other Solicitors interested, for their approbation; if they cannot agree upon it, and it becomes necessary to refer it to the Master, a copy of the title and ordering part of the decree, or order, must be left with the Master, together with a fair copy of the case; and a warrant to proceed on the case must then be taken out and served, and on the attendance upon this warrant the case is settled. When completed, the Master issues his certificate of having settled the case, which is filed at the Report Office (*n*).

Signature of Counsel;

It is to be noticed, that, by the rules of the Courts of Law, the signature of Counsel on both sides is required to a case, even where it has been settled by a Master (*o*). If the Counsel, on either side, refuse to sign it, an application must be made to the Court, that the party whose Counsel has refused to sign it, may procure his signature to it, upon which an order will be made that he do procure the signature of his Counsel, or shew good cause to the contrary (*p*). If the case is not then signed, or cause shewn why it should not be signed, the party will be understood to have waived the benefit of it (*q*).

how enforced.

Proceedings in Court of Law.

After this a *concilium* is moved for in the Court of Law, and a rule obtained from the proper officer, the case is then set down by the Clerk of the Papers, and copies made for the Judges and left with their Clerks. The Judges of the Court to which the case is sent, after it has been argued by Counsel before them (*r*), return their opinion to the Judge who directed the case (*s*), which they usually do in the form of a certificate, but without stating any reasons for their opinion (*t*).

Certificate of Judges

must be filed;

The case and certificate of the Judges having been procured from the Judge's Clerk, must be filed in the Report Office,

(*m*) Houston v. Hughes, 6 Barn. & C. 413. 421.

(*n*) 2 Smith's Ch. Pr. 94.

(*o*) Bliss v. Collins, 1 Jac. W. 426.

(*p*) Ibid.

(*q*) Ibid.

(*r*) If the Court of Law thinks it necessary, they will direct the case to be argued more than once; vide Marquis of Cholmondeley v. Lord Clinton, 1 J. & W. 2; 2 Barn. & Ald. 625, S. C.

(*s*) 1 Newl. 355.

(*t*) Sed vide Cholmondeley v. Clinton, ubi supra.

after which the cause is set down for hearing upon further directions in the usual manner.

Proceedings upon case.

—further directions.

The Court of Chancery is not bound by the certificate of the Judges upon a case directed for the opinion of a Court of Law, and may, if it has any doubt upon the matter, either send it back for the consideration of the same Court (u), or, which is more usual, send it to another Court of Law. This was done in *Trent* v. *Hanning* (x), in which it was stated, by Lord Eldon, that he remembered but one instance in which a case was sent back to the same Court to be reviewed, and that was *Utterson* v. *Vernon* (y).

Court may direct new case

—to another Court.

It should be mentioned, that where, after the Judges had certified their opinion upon the case, the Court thought proper to amend the case, by the introduction of new facts, it appears to have been sent back to the same Court for their opinion, whether the facts, so introduced, were admissible as evidence in the case, and, if so, whether, on the case so amended, they were of the same opinion as before certified by them (z).

Amended case sent to same Court.

The costs of a case directed for the opinion of a Court of Law, generally follow the result.

Costs.

Sect. IV.

Proceedings under Decrees for a Partition.

In the case of partition of an estate, if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at Common Law, have led to applications to Courts of Equity for partitions, which are effected by first ascertaining the rights of the several persons interested, and then issuing a commission to make the partition required: and upon the return of the commission, and confirmation of

In what manner partition effected.

By Commission.

(u) Utterson v. Vernon, 3 T. R. 539; 4 T. R. 570.

(x) 10 Ves. 495.

(y) Ubi supra.

(z) Lowe v. Manners, Seton on Decrees, 355.

By commission.

that return by the Court, the partition is finally completed by mutual conveyances of the allotments made, to the several parties (*a*).

In what cases commission directed by original decree.

Where the title of the plaintiff and of all the other parties is clear upon the record, the Court will, at the original hearing, order a commission of partition to issue, in the first instance, without any previous reference to the Master. If the titles are not clear, the Court will direct an inquiry for this purpose; however, the plaintiff must state upon the record, his own title and the titles of the defendants; and, with the view of enabling the plaintiff to obtain a partition, the Court will direct inquiries to ascertain who are, together with him, entitled to the whole subject. If, therefore, the state of the record, as originally framed, is not such as to authorize the Court to say that the plaintiff and the defendants are respectively entitled in distinct shares, the proper course is to direct a reference to the Master, to ascertain what are the estates and interests of the plaintiff and the defendants respectively; and if it appears that they or some of them are entitled to the whole, then to order a partition according to the rights of all or such of them as appear entitled, dismissing the Bill as against those who do not appear to have any right' (*b*).

In what cases previous inquiry will be directed.

Commission generally ordered by same decree.

But although the Court directs such inquiries by the decree, it generally goes on, by the same decree, to order a partition to take place, according to the finding of the Master, and the commission to issue, without requiring the cause previously to come on again for further directions upon the Master's report. This appears to have been done in *Treherne* v. *Nash, Barker* v. *Westmoreland*(*c*); and in *Agar* v. *Fairfax*(*d*); where a reference was directed to inquire whether the plaintiff and the defendants respectively, or any and which of them were entitled, &c., it was, by the same decree, directed, that if the Master should find that all or any of them were so entitled, then he should inquire into the shares and proportions in which they

(*a*) Lord Red. 97. Where the object is the partition of an advowson, it is done by the decree (without a commission,) directing alternate presentations; Bodicoate v. Steers, 1 Dick. 69; Seton on Decrees, 190, S. C.

(*b*) Per Lord Eldon, in Agar v. Fairfax, 17 Ves. 552.

(*c*) Seton on Decrees, 188, 189.

(*d*) 17 Ves. 533.

were so entitled; and, in that case, a commission was to issue &c., with the usual directions, but that, if the Master should not find the plaintiff or defendants, or any of them, entitled, &c., he was to state that to the Court before any further proceedings, and the consideration of costs and further directions was reserved (*e*).

By commission.

The Court, however, sometimes abstains from ordering the commision to issue until the cause comes on for further directions upon the report (*f*), but this should not be done except in special cases, in consequence of the delay it may occasion.

But sometimes not till further directions.

It is to be observed, that, although the Court directs a commission to issue, by the same decree that it directs inquiries as to the rights and interests of the parties, such commission must not issue until the report of the Master upon the inquiry has been absolutely confirmed, in order that any of the parties who may be dissatisfied with the report, may have an opportunity of taking the opinion of the Court as to its correctness upon exceptions.

But if not—commission not to issue till Master's report upon inquiries confirmed.

The decree sometimes directs *one or more* commissions of partition to issue (*g*), and sometimes it refers it to the Master to settle how many commissions should issue in case the parties differ (*h*); but if the decree only directs one commission, and it afterwards appears to be necessary that there should be more than one, an order for that purpose may be obtained upon motion (*i*); and this may be had at the instance of the defendant, as well as of the plaintiff in the cause, in which case a direction will be given that, in case the plaintiff shall refuse to sue out such commissions, the defendant may be at liberty to do so (*k*).

One or more commissions may be directed by decree.

Or obtained upon motion.

As the decree directing the commission does not name the Commissioners, the first step, in proceeding under such a decree, is to name them.

Nomination of Commissioners.

Each party appearing by a seperate Solicitor, is entitled to name four Commissioners, and the parties must join and strike their names in the same manner as upon commissions to exa-

—by striking names.

(*e*) Murray v. Shadwell, 17 Ves. 353.

(*f*) Vide Calmady v. Calmady, 2 Ves. jun. 568, and Attorney-General v. Hamilton, 1 Mad. 214.

(*g*) Vide Earl of Cardigan v. Sir Edward Montagu, Seton on Decrees, 185.

(*h*) Ibid.

(*i*) Vide Hand. 123.

(*k*) Ibid.

By commission. mine witnesses (*l*), except that where there are more defendants or sets of defendants than one, each defendant or set of defendants joins and strikes names with every other defendant or set of defendants (*m*).

—or by consent.

To save expense, however, it is very common for the parties to agree, amongst themselves, upon two persons to act as Commissioners (*n*).

Commission how sued out.

—by whom

The Commissioners' names having been struck, or agreed upon, are then inserted in the commission, which is usually made out by the Clerk in Court for the plaintiff; but it seems that, if the plaintiff refuses to sue it out, an order may be obtained that the defendant or defendants may be at liberty to do so (*o*).

The form of a commission of partition is as follows,—

Form of commission.

VICTORIA, *by the grace of God, &c. To A. B., &c., Greeting: Whereas by a decree pronounced in our high Court of Chancery, bearing date, &c., and made upon the hearing of a certain cause, depending in our said Court, Wherein John Doe, &c., are complainants and Richard Styles is Defendant, it was ordered and decreed that a commission should issue, &c. Now know ye, that we, in confidence of your prudence and fidelity, have appointed you, and do by these presents give full power and authority unto you, any three or two of you, and hereby command you that you, any three or two of you, do meet together, at certain proper and convenient times and places, by you, any three or two of you, to be for that purpose appointed, and that you, any three or two of you, do from thence go to, enter upon, and walk over and survey the estate in question, in the said decree and pleadings of this cause mentioned, and according to the best of your skill, knowledge, and judgment, make a fair partition, division, and allotment thereof, and the same separate, divide, and allot, and appoint one moiety thereof as and for the share of the said complainants, and the other moiety thereof as and for the share of the said defendants, to be held and enjoyed by the said complainants and defendants in severalty, and the parts so divided, to distinguish and separate, by metes and bounds; and for the better making such division, we do hereby authorize and empower you,*

(*l*) Ante, pp. 494, 5.
(*m*) 1 Smith's Ch. Pr. 478.
(*n*) Ibid.
(*o*) Hand. pp. 123, 4.

any three or two of you, to cause all such witnesses as you shall see occasion for, to come before you, and then and there examine each and every of them apart, upon their respective corporal oaths first taken before you, any three or two of you, upon such interrogatories, in writing, as you shall see occasion for, to discover and make out the truth of the premises, and to take the depositions of such witnesses in writing, and cause the same to be plainly and fairly engrossed or written on parchment. And when ye have done and performed all these things, ye shall certify and return, into our Court of Chancery, without delay, wheresoever our said Court shall then be, the facts and proceedings in the premises, by your certificate, fairly written on parchment, together with the said examinations and interrogatories, and also this writ closed up under the seals of you, any three or two of you.

By commission.

Witness ourself, &c.(*p*).

It is to be observed, that although the return to the commission is directed to be '*without delay,*' the Commissioners are not limited, as in a commission to examine witnesses, to execute it before the end of the term following that in which it is sealed (*q*).

Return of.

It likewise differs from a commission to examine witnesses in another respect, that it may be executed in or within twenty miles of London (*r*). It is also an open and not a closed commission, and the proceedings under it are open and not secret, nor is any oath of secrecy required to be taken by the Commissioners or those employed under them (*s*).

May be executed in London.

No oath of secrecy taken by Commissioners.

In order to enable the Commissioners to perform their duty, they are, as we have seen, armed with a power to cause all such witnesses as they may see occasion for, to come before them to be examined. This may be done by summons from the Commissioners, of the same nature as the summons before pointed out, as issued by Commissioners for the exami-

Powers of Commissioners.

Examination of witnesses.

(*p*) Vide Curzon v. Lyster, Seton on Decrees, 188; where it is stated, (p. 191,) that the draft of this commision was settled by Lord Redesdale; *vide etiam* the commission of partition in the Earl of Cardigan v. Sir Edward Montague, 2 Newl. Pr. 328.

(*q*) 1 Smith, 479.

(*r*) Ibid.

(*s*) Vide Lord Redesdale's opinion upon the commission in Curzon v. Lyster, Seton on Dec. 191.

By commission. Upon oath.

nation of witnesses (*t*), and, upon the witness attending, the oath may be administered to him by two or more of the acting Commissioners; the oath being the same in form as that administered by the Examiner *mutatis mutandis* (*u*).

Upon interrogatories.

Signature of Counsel not necessary.

The witnesses must be examined upon interrogatories, but it does not appear that this case is within the rule laid down by the orders of the Court, which requires all interrogatories for the examination of witnesses to be signed by Counsel (*x*); for the reason of those orders, expressed in the orders themselves, seems to extend only to the common case of examining witnesses before persons who have no discretion in the acceptance or rejection of the interrogatories. Here the interrogatories are to extend only to such points as the Commissioners see occasion to examine to, and they may reject interrogatories signed by Counsel, and suggest others more proper. The discretion, therefore, vested in the Commissioners, is, in this case, to be considered as substituted in lieu of the discretion in other cases attributed to Counsel under the control of the Court (*y*).

Commissioners may reject interrogatories and suggest others.

Cross-examination.

Cross-interrogatories, for the examination of witnesses, may be prepared on the spot, and offered to the Commissioners as occasion may require (*z*).

Examination by Commissioners,

Although the interrogatories for the examination and cross-examination of witnesses before Commissioners of partition, are usually prepared by the parties, yet the Commissioners may, if they think fit, exhibit interrogatories for that purpose themselves.

should be upon written interrogatories, and not *ore tenus.*

It is said, in *Meers* v. *Stourton* (*a*), that the Commissioners may examine witnesses under the commission *ore tenus*, and that this was affirmed, by Mr. Vernon, to be the practice. Lord Redesdale's opinion, however, is, that if the Commissioners think proper to ask any questions, for their own information, they ought to reduce them first into writing, in the form of

(*t*) Ante, p 503. *Query* whether a subpœna will lie to compel the attendance of witnesses before commission of partition?

(*u*) Ante, p. 481.

(*x*) Ante, p. 466; Beames's Ord. 272, 311.

(*y*) Vide Lord Redesdale's opinion in Curzon v. Lyster, ubi supra.

(*z*) Ibid.

(*a*) 1 Dick. 21.

interrogatories, and return the questions and answers, separately, as questions put and answers taken at their instance (*b*).

By commission.

Examination of witnesses apart.

The Commissioners have power, under the commission, to examine the witnesses apart from each other; and Lord Redesdale's opinion is, that they may do so, if they have any suspicion of manufactured evidence, but that, otherwise, their proceedings should be open, as they act in a judicial capacity, in the nature of a Court at which the parties and their agents have a particular right to be present, as expressly directed by the writ of partition at common law (*c*).

Commissioners should administer the questions themselves;

The Commissioners themselves should administer the questions to the witnesses, and Lord Redesdale is of opinion, that it will not be advisable for the Commissioners to let the Solicitors for the parties put the questions, though he is not clear whether the parties have not a right to such assistance if they think proper to use it (*d*).

not bound personally to take depositions.

The Commissioners are not bound, personally, to take the depositions, that is, to write down the answers of the witnesses; but they may employ Clerks to do do this part of the business. But the Clerks must act entirely by their direction, and write the substance of what falls from the witnesses in the language the Commissioners direct. If any dispute arises, as to the evidence given by a witness, the Commissioners must agree amongst themselves upon the words of the deposition, and, having done so, the depositions must be read over to the witness, and ought to be signed by the witness before he is dismissed (*e*).

Course of proceedings in case of disputes about evidence.

If the Commissioners, on either side, propose to receive evidence touching any matter not relevant to the business before them, the Commissioners on the other side should object to receiving such evidence, and may refuse to sign the depositions, if taken, and to annex them to the return (*f*).

Depositions of each party to be kept distinct.

The depositions, on behalf of the different parties, as well as the examinations taken by the Commissioners to their own

(*b*) Lord Redesdale's opinion in Curzon v. Lyster, ubi supra.

(*c*) Ibid.

(*d*) Ibid.

(*e*) Ibid. 197.

(*f*) Ibid. 195.

By commission. satisfaction, should be kept distinct, as in the case of a commission for the examination of witnesses.

Must be signed by witnesses and engrossed upon parchment, and annexed to the commission.

When the depositions of the witnesses have been taken and signed, they must be fairly engrossed, upon parchment, in the same manner as depositions taken under a commission to examine witnesses (*g*); and, according to the directions in the commission, they should be returned together with the interrogatories with the commission (*h*).

Production of deeds, &c.

According to the usual form of decrees made in cases of partition, all deeds, &c., relating to the estates to be divided, in the custody of any of the parties, are to be produced before the Commissioners, upon oath, as the Commissioners shall direct (*i*). When this is the case, the method of compelling the production of the deeds, &c., appears to be, by serving the party with a writ of execution of the decree, (or of a short order to be obtained for that purpose,) and then proceeding by *attachment* and other process of contempt against him (*k*). The same method may be resorted to to enforce the examination of parties upon interrogatories, which the Commissioners are sometimes empowered to take (*l*).

How compelled.

Examination of parties.

Method of executing commission.

Having seen what the powers of the Commissioners under a commission of partition are, we will now proceed to point out the method of executing the commission; and here it is right to observe, that the Commissioners, when once they are appointed, though named by the different parties, are Commissioners for

(*g*) Ante, p. 514.

(*h*) In Watson v. the Duke of Northumberland, it was stated, at the bar, that, upon very few commissions has any return been made of the evidence (11 Ves. 157;) and Lord Eldon said, he believed the practice to be as it had been stated, and that the return is made without the evidence, (ibid. 161.) It is, however, suggested, that a compliance with the directions of the commission would, in this case as in all others, be the proper course.

(*i*) Vide Seton on Decrees, 184. In Norris v. Le Neve, a special order to this effect appears to have been made, directing not only the production of the documents, &c., before the Commissioners, but that they should be deposited in the hands of the respective Solicitors of the parties in the country, a fortnight before the execution of the commission, and to be ascertained by the affidavits of the several parties depositing the same, to be made before a Master Extraordinary in the country; and the parties or their agents were to be at liberty to inspect the same in such Solicitor's hands, and at their own expense to take copies thereof, or any part thereof, as they should see fitting. Reg Lib. B. 1741, fo. 473; Seton on Decrees, 201.

(*k*) Vide Trig v. Trig, 1 Dick. 325.

(*l*) Vide Seton on Decrees, 200.

all the parties (*m*). In fact, they are to act as Judges, the whole power of the Court being delegated to them; and, if all four act, and there is a difference of opinion amongst them, one being of one opinion and three of another, the three make the return; and so, if three are present and two concur in opinion against the third, that is sufficient; but the commission does not authorize two out of four to act, where all four are present; and, therefore, it does not authorize a double return by two Commissioners one way, and by the other two another way; though if two only are present a return by them will be good (*n*).

Commission.

Commissioners are to act as Judges.

Majority present must concur.

Return cannot be by two out of *four*.

As the Commissioners act as a Court, their proceedings ought to be open. The parties or their Solicitors should attend them: should point out what may tend to give the Commissioners full information on the subject; should produce their deeds and other evidence, as well written as oral; should know what evidence is given on both sides; should be at liberty to cross-examine the witnesses under the control of the Commissioners, and take every step necessary to discover the truth and enable the Commissioners to make a proper return (*o*).

Proceedings must be open.

The Commission itself ought to be produced to the Commissioners when they meet, and should remain with them till their proceedings are closed and the return annexed (*p*).

Commission to be left with Commissioners till executed.

The course to be pursued by the Commissioners under a commission of partition, is very clearly pointed out by the terms of the commission. In the first place, they are directed to '*go to, enter upon, and walk over, the estate in question, in the said decree and pleadings in this cause mentioned*' (*q*). In order that they may do this, they must first ascertain the estates which are the subject of the commission. For that purpose, they must look into the Bill and answers; and if, from thence, they can ascertain the property, they must stop there: if they find the descriptions in those instruments such as are not sufficiently

Commissioners to go over the estates.

Must first ascertain what the estates are, from pleadings;

if pleadings not sufficient, from evidence,

(*m*) Per Lord Eldon in Watson v. the Duke of Northumberland, 11 Ves. 153, 160.

(*n*) Watson v. the Duke of Northumberland, ubi supra.

(*o*) Vide Lord Redesdale's opinion in Curzon v. Lyster, ubi supra.

(*p*) Ibid. 197.

(*q*) Vide supra, p. 772.

Commission.

Nature of evidence for that purpose; must not relate to estates not in question,

unless boundaries are intermixed.

accurate to enable them to proceed, they must endeavour to supply the defect in the pleadings by evidence. But the pleadings must still be their guide as to what evidence they shall receive; for they are to divide 'the estates in question in the cause,' and no others; any evidence, therefore, touching estates not in question in the cause, will be irrelevant to the business before the Commissioners, and ought to be rejected by them, except so far as it may be necessary for the purpose of ascertaining what are the estates in question, and such evidence may be necessary if there is any confusion or intermixture of boundaries (*q*) between the estates in question and those not in question.

Partition of estates, how to be made;

Having ascertained what the estate is, which is to be the subject of the partition, the next thing the Commissioners have to do, is to make '*a fair partition, division, and allotment, thereof,*' into as many shares and proportions as the decree or order, under which the commission issues, directs. In doing this the Commissioners must exercise '*the best of their skill, knowledge, and judgment;*' and, provided they do that, and act fairly, the Court will not, as it seems, distrust their return upon the mere allegation of conflicting opinions by different surveyors, with respect to the comparative value of the several lots: the Court considering that, as the Commissioners are named by the parties, and are, therefore, judges of their own choice, the principles which apply to arbitrators are properly applicable to them (*r*). Where, however, it can be shewn that the Commissioners have committed a gross error in judgment, (although there is no proof of partiality,) the Court will set aside their adjudication (*s*).

according to the best of their skill and judgment.

When made, not disturbed in consequence of conflicting opinions as to value.

Every part of the estate need not be divided; but each party must have a fair proportion of all.

It is to be observed, that, in making a partition in Chancery, every part of the estate need not be divided, but that it will be sufficient if each party have his proper share of the whole (*t*).

Thus, where two-thirds of an estate belonged to the plaintiff and one-third to the defendant, and the estate consisted, amongst other things, of a mansion house and of farms and

(*q*) Lord Redesdale's opinion, in Curzon v. Lister, ubi supra.

(*r*) Jones v. Totty, 1 Sim. 136; vide etiam Manners v. Charlesworth, 1 M. & K. 330.

(*s*) Storey v. Johnson, 1 Y. and C. 538.

(*t*) Earl Clarendon v. Hornby, 1 P. Wms. 446.

lands about it, and the defendant insisted that he was entitled to have one third of each allotted to him, Lord Hardwicke said, that 'although in making the partition care must be taken that the defendant should have a third part in value of the estate, there was no colour of reason that any part of the estate should be lessened in value in order that the defendant should have his third of it, which, if he should have one-third of the house and of the park, would very much lessen the value of both' (*u*).

Commission.

House, &c., not to be divided where there is other property.

So, if there be three houses of different values to be divided amongst three, it will not be right to divide each house, for that would be to spoil every house; but some recompense should be made either by a sum of money, or rent for owelty of partition, to those who have houses of less value (*x*).

It sometimes, however, has happened, that the estate to be divided consists of one entire thing, such as a house (*y*), or a cold bath (*z*); in such cases the partition must nevertheless be made, and the difficulty of doing it will be no reason for not effecting it. So the rent payable in respect of water pipes, by a public company for supplying water, laid through the land, has been divided, by apportioning it between the parties, according to their respective quantities of the land through which the pipes ran (*a*). In like manner a mill or an advowson may be divided by giving to the parties every toll dish or turn of a church, as is done at common law in the case of a writ *de partitione facienda*, in which case '*æquitas sequitur legem* (*b*).' In such cases, however, it is probable that the Court

Secus, where property consists of one house only.

Difficulty of making division no reason against partition.

Mill, how divided.

Advowson.

(*u*) Earl Clarendon v. Hornby, 1 P. Wms. 446.

(*x*) Ibid.

(*y*) Turner v. Morgan, 8 Ves. 145. The end of that case was, that the commission having been executed, an exception was taken by the defendant, on the ground that the Commissioners had allotted to the plaintiff the whole stack of chimneys, &c., all the fire-places, the only staircase in the house, and all the conveniences in the yard: and the exceptions were overruled by Lord Eldon, who said he did not know how to make a better partition for the parties; that he granted the commission with great reluctance, but was bound by authority, and that it must be a strong case to induce the Court to interfere, as the parties ought to agree to buy and sell, vide 11 Ves. 157, n.

(*z*) Warner v. Baynes, 2 Amb. 589.

(*a*) Ibid.

(*b*) Earl Clarendon v. Hornby, 1 P. Wms. 446.

Commission.

would direct in what manner the division should be made by the decree, without issuing a commission (*c*).

Allotment of shares;

The Commissioners having apportioned and divided the property, should proceed to set apart and allot the shares to the parties; this they should do, when it can be accomplished,

by Lot,

by lot, for which purpose they should call in some indifferent person, and require that person to draw lots for the shares of each party (*d*).

In what cases Lot improper.

It is to be observed, however, that the course of making the choice of shares, by lot, should not be resorted to where i cannot be done with fairness and with due regard to the situation of the parties and of the shares. In such cases it is the duty of the Commissioners to assign the shares to those parties to whom they would be of most value, (independently of their value in the market,) with reference to their respective situations in relation to the value of the property before the partition took place; and where Commissioners were directed to divide land equally between A., B., and C., and they accordingly divided the lands into portions of equal value in the market, but assigned to A. an inn of which C. had been for many years the occupier, on which he had expended money in improvements, and adjoining to which he had purchased property for the purpose of his occupation, it was held by Lord Lyndhurst, (L. C. B.,) that the adjudication of the Commissioners was wrong, and a fresh commission was directed to new Commissioners (*e*).

Certificate of Commissioners.

The Commissioners having divided and allotted the estate, should prepare their certificate, which must detail their proceedings, and appoint the shares of each party, according to their allotments to be enjoyed by them in severalty, distinguishing each part, if so directed by the commission, by metes and bounds.

Separate certificates where Commissioners disagree.

If the Commissioners cannot agree upon a division or allotment, they must make separate certificates (*f*), though the

(*c*) Vide ante, p. 770, n.

(*d*) Lord Redesdale's opinion in Curzon v. Lyster, Seton on Dec. 197.

(*e*) Storey v. Johnson, 1 Y. & C. 538.

(*f*) Lord Redesdale's opinion, ubi supra.

consequence of such separate returns will, be, if the Commissioners are equally divided, that they will both be quashed (*g*).

Commissioner's certificate.

Certificate must be engrossed and annexed to commission.

The certificate being prepared it must be fairly written on parchment (*h*), and, having been signed by the Commissioners, must be annexed, together with the examinations of witnesses and the interrogatories, to the commission, which must then be closed up and sealed by the Commissioners or any two or more of them. It seems that if, by mistake, any document which has been referred to by the Commissioners in their certificate, has been omitted to be annexed to the return, the Court will, upon motion, direct it to be added (*i*). If there are two certificates they must both be annexed to the commission.

Duplicate certificates.

When the commission and return have been sealed up, it is brought, either by a Commissioner or by a Messenger to the Six Clerk who made it out, and delivered and filed in the same manner as commissions for the examination of witnesses (*k*).

Order to confirm return *nisi*.

The commission having been returned and filed, an order to confirm it *nisi* may be obtained, by either party; this is generally done by the party suing it out, but if he neglects to do it, the other side may obtain the order.

Exceptions to return.
Motion to quash.

Exceptions may then be taken to it in the same manner as exceptions to the Master's report (*l*). If any ground exists for objecting to a certificate, which is not properly the subject of exception, such as irregularity in its execution, or misconduct or partiality on the part of the Commissioners, it must be made the subject of a motion to quash the return (*m*) which

(*g*) Watson v. the Duke of Northumberland, 11 Ves. 153.

(*h*) Where a schedule written on paper was returned with a commission of partition, the plaintiff's Clerk in Court was allowed to engross it on parchment, and to file the engrossment with the return, in analogy to the practice where foreign depositions are returned on paper. Jones v. Totty, 2 S. and S. 219.

(*i*) Vide Manners v. Charlesworth, 1 M. & C. 334.

(*k*) Ante, p. 516.

(*l*) Turner v. Morgan, 8 Ves. 143; Jones v. Totty, 1 Sim. 136; Dean of Hereford v. Hullett, 6 Pri. 332.

(*m*) Jones v. Totty, ubi supra; vide etiam Watson v. the Duke of Northumberland, ubi supra.

Commissioner's Certificate.

must be supported by affidavits. It is frequently the practice to give notice of a motion to suppress the return, and to obtain leave to bring it on at the same time with the exceptions (*n*).

Return quahed partially.

A return may also be partially quashed: thus in *Norris* v. *Le Neve* (*o*), Lord Hardwicke directed that such part of the certificate was to be quashed whereby the Commissioners had certified a doubt concerning a manor and Court Leet, '*because the same was not warranted by the commission.*'

Double return

So if there be a double return and if one party alone applies to quash one of the returns only, the Court will, if it sees proper, order that return to be quashed (*p*). This appears to have been done in *Randle* v. *Adams* (*q*), where two returns were made, and, upon the application of the plaintiff, one of those returns was suppressed and the other established, the former being considered, though nominally a return, as no return in fact; and therefore to be suppressed as if never annexed to the commission. It does not appear, from the statement of the above case in *Watson* v. *the Duke of Northumberland*, what the nature of the return suppressed was; but, in all probability, it was a return by one of the Commissioners only, in opposition to the return of his colleagues, in which case, the return being of one only, would be a nullity, not fewer than two being authorized to act: if the return had been by two Commissioners against the return of two others, both the returns would, for the reasons before stated, have been nullities, and must have been quashed, as was the case in *Watson* v. *the Duke of Northumberland* (*r*) and in *Corbet* v. *Davenant* (*s*), in which latter case the Court of itself refused to proceed, and ordered the return to be quashed.

—not a ground for exception. But motion should be made to quash one or both.

It is to be observed, that the proper course of proceeding, where two Commissioners make one return and two another,

(*n*) Jones v. Totty, 1 Sim. 136; Manners v. Charlesworth, 1 M. & K. 334.

(*o*) Reg. Lib. B. 1741, fo. 473, Seton on Decrees, 201; 3 Atk. 83.

(*p*) Corbet v. Davenant, 2 Bro. C. C. 251.

(*q*) Cited in Watson v. the Duke of Northumberland, 11 Ves. 155.

(*r*) Ubi supra.

(*s*) Ubi supra.

is, not to except to either return, but for each party to move to quash the return which is unfavorable to himself (*t*).

Commissioner's Certificate.

If, however, one party only complains of the return, the Court will not, in such case, order one return only to be set aside, but will quash both and direct a new commission (*u*).

If the return to a commission is quashed, the Court will order a new commission to issue, and, in *Watson* v. *the Duke of Northumberland* (*x*), where there were two returns, each by two Commissioners, it ordered the new commission to be directed to five Commissioners.

If return quashed, new commission will be directed.

If no exceptions are taken to the certificate of the Commissioners, the order for confirming it should be made absolute, and then if the decree contains a direction to that effect, mutual conveyances should be executed by the parties for the purpose of vesting the allotted portions of the divided estates in each other in severalty. This is necessary, because, by a partition made in equity, the equitable right only is vested, which is not the case in partitions made at law, where the legal estate is vested by the partition (*y*). Where infants are parties, mutual conveyances of course cannot be executed till the infants attain 21; indeed the present practice of the Court is, as we have seen, not to direct the conveyance to be executed by any of the parties, whether adult or infant, till that time, but in the meantime to give possession and order enjoyment accordingly till effectual conveyances can be made (*z*).

Motion to confirm return absolute.

Mutual conveyances.

Reasons for requiring them in equity, but not at law.

Where infants are parties.

Where mutual conveyances are to be executed, it usually forms part of the decree directing them that they shall be settled by the Master, in case the parties differ; for the proceedings under which directions the reader is referred to the next section of the present chapter.

Settled by Master if parties differ.

With respect to the title deeds, &c., relating to the estates divided which are in the possession of the parties, it generally forms part of the decree directing the partition, that they

Title deeds and writings; rules with regard to.

(*t*) Corbet v. Davenant, ubi supra.

(*u*) Ibid.; and vide Watson v. the Duke of Northumberland, 11 Ves. 153.

(*x*) Ubi supra.

(*y*) Whaley v. Dawson, 2 Sch. & Lef. 372; Miller v. Warmington, 1 J. & W. 493.

(*z*) Ante, v. 1, 225.

Rules with regard to Title Deeds.

shall be brought into the Master's Office, by the parties upon oath, and that, after the partition, such of them as shall relate to such parts of the premises as shall be allotted to any of the parties alone, shall be delivered to such parties; and as to those which concern any parts of the premises which shall be allotted to any or either of the parties jointly with others, it is sometimes directed that they shall remain in the Master's Office(*a*); but, more generally, the order is that, as to such deeds, the parties are to be at liberty to apply to the Court for directions concerning the same, as they shall be advised(*b*), in which case, it seems the Court will hold that the party entitled to the estate of the greatest value, is entitled to the possession of the deeds, upon entering into a covenant to produce them, and allow copies of them to be taken when required(*c*).

Where they belong to parts of estate allotted to parties jointly with others.

Costs of partition.

With respect to the costs of a partition, the general rule of the Court is now understood to be that which was pronounced by the Court in giving judgment in the case of *Agar* v. *Fairfax* (*d*); that, as the party came into equity instead of going to law, for his own convenience, the rule of law should be adopted, and therefore, no costs should be given until the commission; that the costs of issuing, executing, and confirming the partition, should be borne by the parties in proportion to the value of their respective interests, and that there should be no costs of the subsequent proceedings (*e*).

Where one party has leased his undivided share.

As connected with this subject, it may be stated, that where one of the parties had made a lease of his undivided share, the costs of the lessee, who was a necessary party to the suit for the partition, were thrown exclusively upon the lessor, on the ground that, as such lessee was entitled to his costs, his landlord, who had been the means of bringing him into Court, was the proper person to indemnify him (*f*).

(*a*) Trodd v. Downes, Seton on Decrees, 188.

(*b*) See decree in Earl Cardigan v. Sir Edward Montagu, Seton on Decrees, 184.

(*c*) Seton on Decrees, 186; vide the general form of an order as to title deeds settled by Lord Hardwicke, Hand. 151.

(*d*) 17 Ves. 533, 558.

(*e*) Vide Beames on Costs, 50; vide etiam Calmady v. Calmady, 2 Ves. jun. 568; Baring v. Nash, 1 V. & B. 554.

(*f*) Cornish v. Gest, 2 Cox. 27; Beames on Costs, 51.

It has been decided, that Commissioners of partition have no lien on the commission for their charges (*g*).

Commissioners have no lien for their charges.

Sect. V.

Proceedings under Decrees to settle Boundaries.

Commission.

In a suit to ascertain boundaries, the decree generally directs a commission to issue for that purpose, though sometimes the Court will direct an issue ordering the parties to give a note to each other of their boundaries (*a*).

A commission to settle boundaries partakes very much of the same nature as a commission of partition, it is nearly in the same form, and sued out, executed, and returned in the same manner. There is, however, frequently, this difference between commissions to ascertain boundaries and commissions of partition, viz., that, in the case of a partition, the thing to be divided is clearly ascertained and described, whereas in the case of a commission of boundaries, it is often impossible for the Commissioners to ascertain which they are, with sufficient certainty to set them out. To guard against this, when it is through the default of a tenant or copyholder that boundaries are confused, the Court provides for the case of its being impossible to ascertain them, by directing so much of the defendant's own land to be set out, as shall be equal to the quantity originally granted or leased (*b*); when the commission is of this nature, the Commissioners must proceed accordingly.

Where tenant has intermixed his lands, so that they cannot be seperated.

It is to be observed, that, in a Bill by a Prebendary against several of his lessees for a commission to ascertain the boundaries of his prebendal lands, which had become intermixed

Number of Commissioners.

(*g*) Young v. Sutton, 2 V. & B. 365.

(*a*) Metcalf v. Beckwith, 2 P. Wms. 376; vide etiam Godfrey v. Littel, 1 R. & M. 62; Lethieullier v. Lord Castlemain, Sel. Ca. in Cha. 60; 1 Dick. 46, S. C.

(*b*) Speer v. Crawter, 2 Mer. 410, 418; Willis v. Parkinson ib. 507, 510; Attorney-General v. Fullarton, 2 V. & B, 263; Lord Abergavenny v. Thomas, 1 West 649; Seton on Decrees, 202; Duke of Leeds v. Earl of Strafford, 4 Ves. 180.

Commission.

with their own lands, Lord Eldon held, that the plaintiff had a right to name as many Commissioners as the defendants (*c*).

Mutual conveyances not directed.

The decree in a suit to settle boundaries, does not order mutual conveyances, as in the case of a partition, but directs that, after the lands, &c. have been set out, the defendant is to deliver possession thereof to the plaintiff, and that the plaintiff and his heirs are to hold and enjoy the same against the defendant, or any person or persons claiming under him (*d*).

Further directions.

The consideration of further directions, and of the costs of the suit, is generally in those cases reserved until after the return of the commission (*e*); therefore, when the Commissioners' report has been confirmed absolute, the cause must be set down for hearing for the further directions and costs in the usual manner.

Costs.

With reference to the costs of suits to settle boundaries, no certain rule appears to be laid down; where, however, it does not appear to have been owing to any default, either in the plaintiff or defendant, that the lands have been mixed or confounded, the Court will direct the costs to be borne by the plaintiff and defendant equally, though the interest of one party is more inconsiderable than the interest of the other (*f*). Where, in a suit to establish the boundaries of a manor, it was ordered that the parties should deliver a note to each other of their boundaries, and that the matter should be tried by a feigned issue, and the result of three different trials was that the boundaries appeared as they were given in by the defendant, and contrary to what was alleged by the plaintiff's Bill, the Bill was dismissed with costs, on the ground that the plaintiff might have tried the matter at law, and that no part of the issue had been found for him (*g*).

The decision of the Court with respect to costs, will also be influenced by the relation of the parties; and it is to be recollected, that it has been long settled that a tenant contracts, (among other obligations resulting from that relation,) to keep

(*c*) Willis v. Parkinson, 1 Swanst. 9.

(*d*) Lord Abergavenny v. Thomas, Seton on Decrees, 202.

(*e*) Vide Seton on Decrees, 200.

(*f*) Norris v. Le Neve, 3 Atk. 82.

(*g*) Metcalfe v. Beckwith, 2 P. Wms. 376.

distinct from his own property during the tenancy, and to leave clearly distinct at the end of it, his landlords' property not in any way confounded with his own (*h*); if, therefore, it should appear that a tenant has either voluntarily or negligently permitted the boundaries of his own land to get confused with that of his landlord, the Court will, in all probability, compel him to pay the costs of his misconduct or negligence.

Costs.

Sect. VI.

Proceedings under Decrees to assign Dower.

Where right to dower disputed;

The Court will not assist a widow in the assignment of her dower, out of her husband's estate, if there is any doubt as to her legal right; therefore, if the title to dower be disputed, it refers it to the decision of a Court of Law (*a*), either by directing an issue (*b*), or by ordering the Bill to be retained for a certain time, with liberty to the plaintiff to bring a writ of dower, as she may be advised (*c*).

—where not disputed;

When the right to dower is not disputed, the Court of Chancery assumes a concurrent jurisdiction with Courts of Law, and will direct it to be assigned (*d*); first, however, if it be necessary, directing an inquiry by the Master into what lands the husband died seised of wherein his widow is entitled to dower, &c. (*e*).

in what manner assigned.

The right being established, and the property out of which the wife is dowable being ascertained, the next step is to assign the dower. This may be done either by reference to the Master (*f*), or by directing a commission to issue (*g*).

(*h*) Attorney-General v. Fullerton, 2 V. & B. 264.

(*a*) Lord Red. 98.

(*b*) Mundy v. Mundy, 2 Ves. jun. 122,

(*c*) Read v. Read, and Curtis v. Curtis, Lord Red. 98; 2 Bro. C. C. 620, S. C.; D'Arcy v. Blake, 2 Sch. & Lef. 390.

(*d*) Mundy v. Mundy, ubi supra.

(*e*) Meggot v. Meggot, Seton on Decrees, 261.

(*f*) Ibid.; vide etiam Tinney v. Tinney, ib. 262; Goodenough v. Goodenough, 2 Dick. 795.

(*g*) Seton on Decrees, 261; Wild v. Wells, 1 Dick. 3; Huddlestone v. Huddlestone, 1 Cha. Rep. 38; Lucas v. Calcraft, 1 Bro. C. C. 134; 2 Dick. 594; S. C. Mundy v. Mundy, 2 Ves. jun. 125; 4 Bro. C. C. 295, and the commission in Seton on Decrees, 263.

By Commission. A commission to assign dower is nearly in the same form, and is made out, executed, and returned, in the same manner as a commission of partition (*h*).

Possession. It is to be observed, that, as in the case of settlement of boundaries, it generally forms part of the decree, that when the dower has been assigned, possession shall be delivered to the plaintiff (*i*).

Arrears. The widow is also entitled to an account of the arrears of her dower, and this notwithstanding the death of the heir pending the suit, although at law her right to damages would have been lost by that event (*k*).

Statute of Limitation. The widow's right to the rents and profits accrued from the death of her husband, is not limited to the time of filing the Bill (*l*). Formerly it was held, that the Statute of Limitations, 21 Jac. 1, c. 16, did not affect proceedings to recover arrears of dower (*m*), but the recent statute, 3 & 4 W. 4, c. 27, s. 41, expressly applies to them (*n*).

Interest. It may be mentioned here, that interest will not be allowed on arrears of dower (*o*).

Further directions. When the assignment has been referred to the Master, the same decree may direct the account of rents and profits (*p*), but where the assignment of dower is by commission, it must be deferred till the cause comes on for further directions.

Costs. Lord Redesdale observes, that, 'in the two cases of partition *and assignment of dower*, as no costs can be given in a Court of Common Law upon a writ of partition or a writ of dower, no costs have commonly been given in a Court of Equity upon Bills for the same purposes' (*q*); and, as respects dower, this appears to be the present rule of the Court, in cases where the widow comes into Court for the single purpose of having dower assigned her (*r*). The rule, however, is subject to exception

(*h*) Ante, sect. IV.

(*i*) Meggot v. Meggot, Seton on Decrees, 261; Goodenough v. Goodenough, 2 Dick. 795.

(*k*) Curtis v. Curtis, 2 Bro. C. C. 620; vide contra Lord Red. 98.

(*l*) Curtis v. Curtis, ubi supra; Mundy v. Mundy, 2 Ves. jun. 122; Oliver v. Richardson, 9 Ves 222.

(*m*) Ibid.

(*n*) Ante, p. 166.

(*o*) Lindsay v. Gibbon, cited 3 Bro. C. C. 495; Wakefield v. Childs, 1 Fonb. 23.

(*p*) Meggot v. Meggot, ubi supra.

(*q*) Lord Red. 98.

(*r*) Lucas v. Calcraft, 1 Bro. C. C. 134; vide etiam Sir S. Romilly's note of the same case, ib. Ed. Belt, (n).

where previous questions are raised, in litigating of which the party is vexatious (*s*); therefore, where the widow had, without any just pretence, been kept out of her dower, Sir W. Grant. M. R., awarded her her costs (*t*). In *Meggot* v. *Meggot* (*u*) also, the Court appears to have awarded the widow her costs, up to the time of the decree, reserving the consideration of the subsequent costs until after the report (*x*).

Dower.

Sect. VII.

Proceedings in the Master's Office.

According to the ancient practice of the Court, all references to a Master used to be made to one of the two Masters sitting in Court, as assistants to the Lord Chancellor or Master of the Rolls, when the reference was made (*a*); but the modern practice, where there has been no previous reference, is to refer it '*to the Master in rotation*,' and, where there has been a previous reference, '*to the Master to whom this cause stands referred*' (*b*).

To what Master references are made.

Where the reference is directed to be made 'to the Master in rotation,' the practice appears to be for the Solicitor having the conduct of the cause, to take the decree, or an office copy of it duly marked (*c*), to the Clerk of the Public Office in Southampton Buildings, who procures the sitting Master to mark upon the decree the name of the Master in rotation according to a *rota* settled by the Masters, and kept for that purpose in the Public Office (*d*).

Master in rotation, how ascertained.

(*s*) Lucas v. Calcraft, ubi supra.
(*t*) Worgan v. Ryder, 1 V. & B. 20; Beames on Costs, 36.
(*u*) Seton on Decrees, 261.
(*x*) Sed vide Outhwaite v. Outhwaite, referred to by Mr. Beames in his Treatise on Costs, 36, n. 5.
(*a*) Prac. Reg. 363; where a reference is made for the examination of Court Rolls, touching any custom, it should not be to any one Master but to two at the least, Ibid.
(*b*) Ord. 21 Dec. 1833, XV.; sometimes, when an order for a reference is made just before the long vacation, and the matter is pressing, the references will be made to 'the Vacation Master.'
(*c*) Ante, p. 671.
(*d*) 2 Smith. 97.

Master in rotation.

This, however, only takes place where the reference is directed by decree, or by order subsequent to a decree,—when an application is to be made to a Master under the 3 & 4 W. 4, c. 94, s. 13, or under the orders made in pursuance of that act; or, *where any reference has been made to a Master in the cause, and no previous application or reference has been made,* the name of the Master in rotation must, in pursuance of the 15th of Lord Brougham's Orders (*e*), be ascertained in the manner pointed out in the 16th and 17th of the same Orders; and all applications authorized by the said Act, or by the Orders of the 21st of December, 1833, to be made to a Master; and every such reference, as aforesaid, must be made to the said Master in *rotation*; for which purpose, the 16th Order goes on to direct that as to all Bills which shall have been filed before the day of the date of the orders of December, 1833, (viz., the 21st of December, 1833.) Where any reference has been made in the cause, the name of the Master to whom the last reference was made in such cause, shall, at the request of either of the parties thereto, or of his or her Solicitor, and on producing such order of reference, with the Master's name certified thereon, or appearing therein, be added, by the Six Clerk, to the original entry of the cause in the Six Clerk's book, and entered in the book to be kept as directed in the 17th Order next referred to; and the Order directs that all applications under the above Act, or Orders, and all such references as aforesaid, shall be made to such last mentioned Master.

Where previous reference has been made.

Where no previous reference has been made.

The method of ascertaining the name of the Master in rotation, where no previous reference has been made, is pointed out in the 17th Order (*f*), which directs that, in all cases where it shall become necessary to ascertain the name of the Master in rotation, for the purposes of the two preceeding or any succeeding order, one of the Six Clerks shall give to the Solicitor for the plaintiff or defendant requiring the same, a certificate of the Bill filed, which certificate shall, on the same or the following day, be marked by the Master of the day, at the

(*e*) Ord. 1833. (*f*) Ord. 1833.

Public Office in Chancery, with the name of the Master in rotation for such cause; and such certificate, so marked, (having been first produced to the said Master in rotation,) shall on the same day be returned to the Six Clerk and be filed by him, and he shall add the name of such Master to the original entry of the cause in the Six Clerk's book, and shall also cause the name of the cause and of such Master to be entered in a book to be kept by the Six Clerks, for that purpose, in the Six Clerk's Office, and which shall be open to inspection at all times during the office hours, without fee.

Master in rotation.

It is to be recollected, that the above orders only apply to applications under the Act, and orders consequent thereupon, and to cases in which a reference is required to be made to a Master upon interlocutory applications, where no application or reference has been before made in the cause; when the reference to the Master in rotation is made by decree or decretal order, the name of the Master must be ascertained, in the manner above stated (*g*). If the decree refers it '*to the Master to whom the cause stands referred,*' it is not necessary to get the Master's name repeated on the decree, but a copy of the title and ordering part thereof is left at that Master's office (*h*).

In cases of decrees and decretal orders, no certificate of Bill filed necessary.

It is to be noticed, that where a reference was directed by a decree '*to the Master in rotation,*' although previous references in the cause had been made to a Master, and a motion that the reference to the Master in rotation might be declared null and void, and that the reference might be made to the Master to whom the previous references in the cause had been made, the Vice-Chancellor was of opinion that the language of the decree was right, as, by the terms of the order, 'the Master in rotation was the same Master to whom the previous references had been made (*i*).'

Reference in decree to Master in rotation, will authorize the reference being taken by Master to whom previous references have been made.

It may be mentioned, in this place, that after a cause has been referred to a Master, it cannot be withdrawn from that Master without an order of the Court, and that such an order will not be made useless on very special occasions, such as the incapacity of the Master, from illness, to attend to the busi-

Change of Master.

(*g*) Ante, p. 789.
(*h*) 2 Smith, 97.
(*i*) Attorney General v. Shore, 6 Sim. 461.

Change of Master.

ness, which, to justify such a removal, must be shewn to be of a very urgent nature. In one case, it appears, that Lord Eldon directed a cause to be removed on the allegation of Counsel, that he found the Master in such a state, from his advanced age and infirmity, that it was not proper to go into the business before him (*k*). Sometimes, where the Master has died and a successor has not been appointed, the Court will make an order that the cause, if the matter of the reference requires immediate attention, should be transferred to another Master (*l*). And it occasionally occurs that, where it is very important to the interests of the parties that some particular branch of a cause in a Master's Office should be proceeded with during the long vacation, the Court will make an order directing that branch of it to be referred to the 'Vacation Master.'

References to Vacation Master.

Conduct of the Cause.

Conduct of the cause; —belongs to plaintiff or person obtaining the order.

The prosecution of the decree devolves upon the plaintiff, he being considered, in most cases, as the person principally interested in forwarding it. A reference upon an interlocutory order is, for the same reason, usually prosecuted by the party obtaining it, whether plaintiff or defendant. In order, however, to prevent delay in the prosecution of the decree by the party whose duty it is to prosecute it, it is provided, by the 17th of Lord Lyndhurst's Orders (*m*), 'That where any decree or order referring any matter to a Master, is not brought in to the Master's Office within two months after the same decree or order is *pronounced* (*n*), then any party to the cause, or any other party interested in the matter of the reference, shall be at liberty to apply to the *Court*, by motion or petition,

Proceeding where plaintiff omits to carry in decree.

(*k*) Anon. 9 Ves. 341.

(*l*) In one case it appears that, upon the death of a Master, a general order was made, that all matters referred to him should be transferred to another, Prac Reg. 165.

(*m*) Ord. 1828.

(*n*) This ought to have been when the decree or order is *entered*, since a very considerable time frequently and of necessity elapses before a decree or order, after it has been *pronounced*, can be passed and entered.

as he may be advised, for the purpose of expediting the prosecution of the decree or order (*o*)

Conduct of the Cause.

It is also provided, by the 56th of the same Orders, that where the party actually prosecuting a decree or order, does not proceed before the Master with due diligence, then the Master shall be at liberty, upon the application of any other party interested, *either as a party to the suit, or as one who has come in and established his claim before the Master, under the decree or order*, to commit to him the prosecution of the decree or order, and that, from thenceforth, neither the party making default nor his Solicitor shall be at liberty to attend the Master as the prosecutor of the decree or order. Previously to the above order, however, in creditors' suits especially, the practice of the Court had been, in case the party whose business it was to prosecute a decree neglected his duty, to allow a party interested as a creditor to obtain an order to prosecute it in his stead (*p*); and it seems that the Court will still exercise its authority, by taking the prosecution of a decree from the plaintiff and entrusting it to another, and that even after the Master has exercised his judgment upon it, and has refused an application under the 56th Order above mentioned (*q*). In *Cook* v. *Bolton* (*r*), such an order was made, notwithstanding the suit

—or to prosecute it afterwards, by application to Master;

to the Court.

even where Master has refused;

although suit abated by the death of a defendant.

(*o*) In Mr. Smith's Chancery Practice, the course of proceeding, where the party having the carriage of the decree, does not procure the name of the Master in rotation to be marked thereon, or having done so, fails to carry the same into the Master's Office, is for the opposite party, if he has not taken, or is not justified by the nature of his interest in taking, an office copy of the decree, to give notice to the plaintiff's Solicitor, that, unless he procures the name of the Master in rotation to be marked, and carries the decree into the Master's Office within two days, or within any reasonable time, or sends him the decree to enable him to do it for him, he shall be compelled to take an office copy of the decree; and, if neither alternative is complied with, the party giving the notice will be entitled to the costs of taking an office copy. If the defendant has taken an office copy of the decree, and the plaintiff does not procure the name of the Master in rotation to be marked, and the decree carried in to the Master's Office, then the defendant may get his office copy marked, and leave a copy of the ordering part of the same in the Master's Office, or, if he prefers it, he may apply under the 48th Order, 2 Smith's Ch. P. 97.

(*p*) Creuze v. Hunter, 2 Ves. jun. 157, 165. Vide etiam Sims v. Ridge, 3 Mer. 358; Powell v. Walworth, 5 Mad. 31; Fleming v. Prior, 2 Mad. 183; Edmonds v. Ackland, 5 Mad. 423.

(*q*) Wyatt v. Sadler, 5 Sim. 450

(*r*) 5 Russ. 282.

Conduct of the Cause.

was abated by the death of a defendant, and the Lord Chancellor (Lord Lyndhurst,) refused to discharge it (*s*).

Master to certify state of proceedings in his office.

Applications to the Court, of the nature above pointed out, may be greatly facilitated by the operation of the 57th Order (*t*), which directs that, upon any application made *by any person* to the Court, the Master, if required by the person making the application, shall, in as short a manner as he conveniently can, certify to the Court the several proceedings which shall have been had in his Office in the same cause or matter and the date thereof.

Warrant to consider the Decree.

Warrant to consider the decree;

Having ascertained the name of the Master to whom the cause is referred, in the manner before pointed out (*u*), the Solicitor conducting the cause must leave a copy of the title and ordering part of the decree with the Master; and it is directed by the 50th of Lord Lyndhurst's Orders (*x*), that, upon the bringing in of every decree or order, the Solicitor bringing in the same shall take out a warrant appointing a time, which is to be settled by the Master, *for the purpose of the said Master taking into consideration the matter of the said decree or order*, and shall serve the same upon the Clerks in Court for the respective parties, and upon the parties or their Solicitors in cases where they shall have no Clerks in Court; and, by the 51st of the same Orders (*y*), it is ordered, that at the time so appointed for considering the matter of the decree or order, the Master shall proceed to regulate, *as far as may be*, the manner of its execution; as for example, to state what parties are entitled

Attendance upon,

(*s*) It is to be observed, that the abatement in the above case, was occasioned by the death of a defendant, so that the suit was not entirely abated; and that the order was supported principally on the ground, that application for it was not so much a proceeding in the cause, as an application to authorize the party to take proceedings in it. When the abatement is occasioned by the death of the plaintiff, the application should not be, that the creditor may be at liberty to prosecute the decree, but for permission to file a supplemental Bill, in case the representative of the plaintiff does not file a Bill of revivor, within a limited time, and to serve the order on such representative, Dixon v. Wyatt, 4 Mad. 393; vide post, Abatement and Revivor.

(*t*) Ord. 1828.

(*u*) Ante, p. 789.

(*x*) Ord. 1828.

(*y*) Ibid.

to attend future proceedings, to direct the necessary advertisements, and to point out which of the several proceedings may be properly going on *pari passu*, and as to what particular matters interrogatories for the examination of parties appear to be necessary, and whether the matters requiring evidence shall be proved by affidavit or by examination of witnesses, and in the latter case, if necessary, to issue his certificate for a commission; and, if the Master shall think it expedient so to do, he shall then fix a certain time within which the parties are to take any proceeding or proceedings before him.

Warrant to consider Decree.

These orders appear to have been framed for the purpose of carrying into effect the recommendation of the Commissioners for inquiring into the practice of the Court (*z*); and certainly if the objects suggested in their report as likely to result from the adoption of the recommendation could be attained, the continuance of these orders amongst the general orders of the Court would be most desirable. It is obvious, however, that, in many cases, the observance of them would be perfectly useless, and that in others, especially in those in which the enforcement of their provisions would be most desirable, it would be impracticable to carry them into effect. It is observed, by an intelligent writer upon this subject, 'that, in certain references, the obligation to take out this warrant is a tax upon the suitor, an expense without the slightest advantage; and there is something ludicrous in a warrant to consider how a decree dismissing a Bill with costs, or containing a simple reference, is to be prosecuted (*a*).' Where the decree is more complicated, and it is in those cases chiefly that the proposed meeting of all parties to consider the method of carrying on the decree would be attended with most advantage, how are the directions of the order to be complied with? It is to be recollected that, upon this attendance, the Master must, necessarily, be totally ignorant of any of the circumstances of the case; all that he has before him, is a copy of the ordering part of the decree alone. He is in no situation to decide what parties are entitled to attend future proceedings. He may perhaps be able, in general, to decide what

—object of;

difficulties of proceeding under;

(*z*) Vide Chan. Rep. p. 20; ib. prop. 67, 68, p. 48.

(*a*) 2 Smith's Ch. Pr. 100.

Warrant to consider Decree.

advertisements will be necessary in carrying on a creditor's suit, but how can he point out, without knowing more than he is likely to do from the mere ordering part of the decree, which of the several proceedings directed upon it may be properly going on *pari passu*, and, as to what particular matters, interrogatories for the examination of the parties, appear to be necessary? and whether matters requiring evidence, shall be proved by affidavit or by examination of witnesses? All and each of these matters require, in cases which are at all out of the ordinary routine, a knowledge of the facts and circumstances of the case, which, in many of such cases, it would be impossible to acquire from the verbal information of the Solicitors attending, or of their managing clerks, and indeed could only be properly brought before the Master in the form of a state of facts (*b*), which would be attended with a considerable expense to the suitor, and was evidently not within the contemplation of the commissioners, in recommending the orders in question. It is true that, in some cases, a compliance with the directions of the 51st Order, might be productive of advantage, by affording an opportunity for suggestions and mutual communications to pass between the Solicitors or their clients, in the presence of the Master; but, in the generality of cases, especially in contested ones, these are not very likely to occur; and, instead of the Master having to listen to useful suggestions and communications between the Solicitors, he would very probably be occupied in listening to discussions and arguments upon points as to which he has no power, from want of information, to come to a proper decision. It is evident, therefore, that, in most cases, a compliance with the terms of these orders, if not injurious, can be productive of little or no advantage whatever; and indeed, the impracticability of complying with the 51st Order, is so strongly felt, that, in some offices, the obligation to take out the warrant to consider the decree is dispensed with, although in others the Masters feel themselves bound to comply with the order (*c*).

—not always taken out.

(*b*) It is stated that, in acting under this order, Master Stratford compelled the party to bring in a state of facts, and proposal as to the manner of executing the decree. 2 Smith, 100.

(*c*) 2 Smith, 100.

Warrants.

Of Warrants.

Of Masters' warrants.

Before we proceed to examine the course of proceeding before a Master in specific cases, it is proper to direct the attention of the reader to certain points relating to the Master's Office, which are common to all references. The first of these points which suggests itself, is the method of bringing the parties who are interested in the subject matter before the Court.

This is done by means of '*a warrant*,' which is a mere memorandum, upon a slip of paper, entitled in the cause, and signed by the Master, appointing a day and hour for all parties concerned to attend him on the matter of the reference; it is generally in this form:—

Form of

By virtue of an order of reference, I do appoint to consider the matters thereby to me referred, on —— next at —— of the clock, in the ——noon, at my Chambers in Southampton Buildings, Chancery Lane, at which time and place all parties concerned are to attend. S. C. Cox (*d*).

Dated the — day of ——— 1830.

How obtained,

This warrant is obtained from the Master's Clerk, by the Solicitor applying for it, who underwrites a momorandum expressing the object of it; after which copies of the warrant are served on the opposite Cleıks in Court (*e*), who forward them to their respective clients (*f*),

—and served.

They should be served upon the Clerks in Court of all parties who are entitled to attend the Master upon the reference (*g*).

Must have one clear day before attendance required.

There must be at least one clear day between the day of issuing the warrant and the day appointed by it for the attendance of the parties thereon; thus on Thursday for Saturday, Saturday for Tuesday, &c. (*h*).

—unless in special applications under the Act;

This rule, however, does not apply to special applications under the 3 & 4 W. 4, c. 94. s. 13; or under the orders made in pursuance of that act, which must be served at least

(*d*) Bennett's Practice, Appx. 1.
(*e*) Ante, p. 314.
(*f*) Bennett's Prac. 7.
(*g*) As to the parties who are entitled to attend the Master, vide post, p. 801.
(*h*) 1 Newl. 324; 2 Smith, 105.

Warrants.

two clear days before the return thereof (*i*). In the case of a warrant *to sign a report*, it is necessary that there should be three clear days between the day of service and the time ap- o i ed by the warrant (*k*).

—or of a warrant to sign report.

Warrant on leaving.

It is to be observed, that, wherever a state of facts, charge, or claim, or other document, is left at a Master's Office, the Solicitor leaving it takes out a warrant, which he underwrites '*on leaving the state of facts, &c.*' This is termed a '*warrant on leaving*,' and is served in the usual manner, but it is considered a mere formal one, to afford the opposite party an opportunity of obtaining a copy of the document left, that he may either admit or contest the circumstances there stated, as he may be advised (*l*).

To proceed.

After the return of this warrant, another is obtained, which is underwritten—'*to proceed on the state of facts, &c.*' This is called a '*warrant to proceed*' (*m*). This must also be served as other warrants, and is *peremptory* (*n*).

Fresh warrants may be sued out as required.

On the attendance, by all parties, before the Master, at the time specified in the warrant, he proceeds to consider the matter referred to him; and, if the matter cannot be got through upon the first attendance, other warrants to *proceed* must be sued out and served till the matter is complete. It is to be observed, however, that if a further affidavit, in support of any proceeding before the Master, is left, and a warrant on leaving is taken out, the warrant 'further to proceed,' must not be returnable, until three clear days after the further affidavit was left (*o*).

It is to be observed that, on every attendance, the Master or his Clerk marks in his book the names of the Solicitors who attend, and that no other attendance than those so marked will be allowed in costs. It is, therefore necessary, for the Solicitor to be careful that his attendance is marked, lest the Master or his Clerk should omit to do it in the hurry of business (*p*).

(*i*) Ord. 1833, XX.
(*k*) 2 Smith, 105.
(*l*) Ibid.
(*m*) Ibid. It is said that the Masters, with one exception allow a party to take out a warrant to proceed at the same time as the warrant on leaving, provided the return of the warrant to proceed is not made earlier than it would have been, if taken out after the return of the warrant on leaving. 2 Smith, 106.
(*n*) Ord. 1828. LIX.
(*o*) 2 Smith, 107.
(*p*) 1 Turn. & V. 338.

Warrants.

In general, the time allowed by the Masters for hearing upon each warrant, does not exceed an hour, but, by the 59th Order, before referred to, the Master is at liberty to continue the attendance beyond the hour, and during such time as he thinks proper, and he is empowered to increase the fee of the Solicitor's attendance, in proportion to the time actually occupied.

Time of Master's hearing, may be enlarged, and Solicitor's fee increased.

The same Order also directs, that, in case the Master shall not be attended by the Solicitor, or a competent person on behalf of the Solicitor; of any party, the Master shall, in such case, disallow the usual fee for the Solicitor's attendance, taking care either in allowing the increased fee or disallowing the usual fee, to mark his determination in his attendance book, and also on the warrant for attendance.

Proceeding where Solicitor neglects to attend.

Formerly, a Master could not proceed with a reference *de die in diem*, without a special order from the Court giving him liberty to do so (*q*); but, by a recent order, every Master is now at liberty to proceed in all matters *de die in diem* at his discretion (*r*). In such cases, as there will be no intermediate time for the service of the usual warrants to proceed, the Master must, on each day, fix the time for the next attendance of the parties.

Master may proceed *de die in diem*,

It is to be observed, that the order above referred to leaves it to the Master's discretion to decide whether he will proceed *de die in diem* or not.

—at his discretion.

Under the old practice, the attendance of a party upon a warrant was not required of him until the second, and in most cases, not before a third, warrant had been served upon him (*s*), but now every warrant for attendance before the Master is to be considered *peremptory* (*t*), and the Master may, upon the *non*-attendance of the party, proceed in his absence *exparte*. For this purpose, he must administer an oath to the person who served the warrant, of the same having been duly served, and then proceed on the business of the warrant (*u*).

Every warrant peremptory.

Upon failure of attendance Master may proceed *exparte*.

The form of the oath made on this occasion is endorsed by

(*q*) Purcell v. M'Namara, 11 Ves. 362.
(*r*) Ord. 1828. LVIII.
(*s*) 1 Newl. 324.
(*t*) Ord. 1828. LIX.
(*u*) 1 Newl. 324.

Warrants.

the Master's Clerk upon the warrant (*x*); and it is to be observed, that the service of the warrant on leaving requires to be proved as well as that of the warrant to proceed (*y*).

If a warrant has been served on *a party* in the country, the service may be proved by affidavit (*z*).

The proceeding *exparte* is not confined to cases where there is only one party who ought to attend, but makes default, for, by the 53rd Order (*a*), it is directed, that, where some or one but not all the parties do attend the Master at an appointed time, whether the same be fixed by the Master personally, or upon a warrant, then the Master shall be at liberty to proceed *exparte*, if he thinks it expedient, considering the nature of the case, to do so.

Proceeding *exparte* not to be reviewed, except Master satisfied that party was not guilty of wilful delay, —and then only upon payment of costs.

It is also provided, by the 54th Order, that, where the Master has proceeded *exparte*, such proceeding shall not in any manner be reviewed, unless the Master, upon a special application made to him for that purpose by the party who was absent, shall be satisfied that he was not guilty of any wilful delay or negligence, and then only upon payment of all costs occasioned by his non-attendance, such costs to be certified by the Master at the time, and paid by the party or his Solicitor, before he shall be permitted to proceed on the warrant to review.

Certificate of default.

—of costs to be paid by absent party.

By Lord Coventry's Orders it is provided that, 'if the case be such that the Master cannot proceed in the absence of either party or his Counsel without just cause absenting, the Master is presently to certify this Court of the default, that the defaulter may be punished by commitment, costs, or otherwise, as the Court shall direct' (*b*); and, by a recent order, it is further provided, that where a proceeding fails, by reason of the non-attendance of any party or parties, and the Master does not think it expedient to proceed *exparte*, then the Master is at liberty to certify what amount of costs, if any, he thinks it reasonable to be paid to the party or parties attending, by the absent party or parties, or by his or their Solicitor or Solicitors,

(*x*) 2 Smith, 107.
(*y*) Ibid.
(*z*) Ibid.
(*a*) Ord. 1828.
(*b*) Beames's Ord. 79.

or Clerk or Clerks in Court personally, as the Master in his discretion shall think fit: and, upon motion or petition without notice, the Court will make an order for the payment of such costs accordingly (*b*).

Warrants.

Parties entitled to attend.

The party conducting the cause in the Master's Office must take care that all parties entitled to attend any proceedings under the decree or order, have due notice by service of warrants in the manner before stated. Who these are, where the parties are numerous and their interests complicated, is not always an easy task to ascertain, and it is conceived that the following general rules upon the subject, which are to be found in a recent Treatise by an Officer of the Court, which has been frequently referred to in the foregoing pages, will be useful to the practitioner in pointing out to him the parties upon whom he ought to serve his warrants.

Parties entitled to attend the Master.

The general rule of the Court appears to be, that all parties beneficially interested, either in the estate or in the fund in question, are entitled to attend before the Master on all those proceedings which may affect their interests, or increase or diminish their proportion in the fund: thus all parties entitled to a distributive share of a residue are entitled to attend on those proceedings which tend to increase or diminish the residuary fund (*c*). The only exception to this rule appears to be the case of a reference to the Master of the title to an estate purchased under a decree, in which case the Master will only allow the vendor's Solicitor to attend before him on the inquiry (*d*). This rule, however, is subject to some limitations, if the fund distributable under a will is sufficient,—thus, general legatees only are allowed to attend on those proceedings which strictly affect or relate to their legacies, and not on the general proceedings; but if the fund is not sufficient to pay the legacies in full, they are entitled to attend all proceedings which relate to or may affect the fund out of which they are to be paid (*e*). Parties entitled only to the personal estate are not entitled to

General rules,

subject to restrictions, in the case of general legatees,

(*b*) Ord. 1828. LV.
(*c*) 2 Smith, 100.
(*d*) Ibid.
(*e*) 2 Smith, 101; vide etiam Chillingworth v. Chillingworth, cited ib. p. 200.

Parties entitled to attend.

—of parties entitled to real or personal estate, unless they have a collateral bearing on each other.

attend those proceedings which affect the real estate alone; and the converse of the rule prevents those interested solely in the real estate from interfering with proceedings relating exclusively to the personal estate, supposing always that these proceedings have no collateral bearing on each other; for if either fund may be affected by the deficiency of the other; each party may be indirectly interested in both, and is then entitled to attend (*f*).

In cases of executors,

An executor, as the legal representative of his testator, is entitled to attend on all proceedings relating to the charges of creditors seeking payment out of the personal estates; but, after there has been a report of debts, if all the parties interested in the personal estate are before the Court, he is only entitled to attend on those proceedings in which he is personally interested as an accounting party (*g*).

—trustees.

Trustees are not allowed, (except in proceedings carried on by themselves,) to attend before the Master in cases where all the *oestui que trusts* are before the Court; but if there are any parties in *esse*, or who may come into *esse*, who may become interested, and whose interests are only represented by the trustees and is not too remote; the trustees will be entitled to attend the proceedings affecting those interests (*h*).

Parties having charges.

Parties having charges on an estate or on a fund, are, if the estate or fund is sufficient, entitled only to attend on the proceedings brought in by themselves; but if there is a deficient fund, each incumbrancer is entitled to attend on the charges of those incumbrances who claim a priority over him, but not on those who do not charge to be of a prior date to his security (*i*).

Creditors.

The same rule applies to creditors coming in to prove their debts under a decree (*k*).

Master to decide upon right of parties to attend,

The above restrictions are adopted for the purpose of protecting the party or the funds upon which the costs of the suit will eventually devolve, from being put to expense, by the unnecessary attendance of parties before the Master; and the application of them is generally regulated by the Master to

(*f*) 2 Smith, 101.
(*g*) Ibid. 102.
(*h*) Ibid.
(*i*) Ibid.
(*k*) Hare v. Rose, 2 Ves. 558.

whose discretion it is left. By the 51st Order (*k*), above referred to, the Master, strictly speaking, is bound, where it can be done, to point out, at the attendance upon the warrant, to consider the course of proceedings under the decree, who the parties are that are entitled to attend him, and, in cases where he may be in a situation to do so, at such attendance, it is very desirable that the terms of the order should be complied with. It is obvious, however, that, in many cases, this would be impracticable; but as the order does not preclude the discussion of this point at any future stage of the proceeding, and the Master may, at any time, entertain an objection to a party attending before him, on the ground, that his interest does not entitle him to do so at the risk of throwing the expense of his attendance upon the fund or the party to be charged with the costs. If the Master, upon an objection being made to the attendance of a party before him, is of opinion that such attendance is inadmissible, he may refuse to mark the attendance of the Solicitor of the party in his book, which will have the effect of depriving such Solicitor of the costs of such attendance upon the general taxation of the costs.

Parties entitled to attend, at the meeting to arrange proceedings, or at any future stage.

Master may refuse to mark Solicitor's attendance.

If the Master should be considered to have come to an improper conclusion in not allowing a party to attend before him, the proper course to obtain the opinion of the Court upon the point would be, to present a petition praying that the party might be permitted to attend the Master. On one occasion, an application by motion appears to have been made to the Court, on the ground that the Master had refused to mark in his book, the attendance of a Solicitor, and the motion was ordered to stand over, that the Lord Chancellor might see the Master, when the object of the motion appears to have been obtained, and it was not mentioned again (*l*).

Mode of appealing from Master's opinion.

It is to be noticed, in this place, that the Master has not only the power of restricting the attendance of parties or their Solicitors before him, in the manner before stated, but he is also empowered, in certain cases, to extend them;—by the 77th of Lord Lyndhurst's Orders (*m*), it is provided, that ' whenever,

Master may direct parties to attend by separate Solicitors.

(*k*) Ord. 1828; ante, 789.
(*l*) 2 Turner & V. 215.
(*m*) Ord. 1828.

Parties entitled to attend.

in any proceeding before a Master, the same Solicitor is employed for two or more persons, such Master may, at his discretion, require that any of the said parties shall be represented before him by a distinct Solicitor, and may refuse to proceed until such party is so represented.'

Rule as to persons who are only *quasi* parties.

The rule that all parties interested in the result are entitled to attend before the Master, applies not only to those who are parties to the restrictions, but to those who are *quasi* parties, by having come in under the decree and established a claim, who, subject to the rules before pointed out (*m*), are entitled to notice of all proceedings which affect their interests. In order to remove the embarrassment which frequently arose as to the proper method of serving such parties, it has been provided, 'That whenever a person who is not a party, appears in any proceeding, either before the Court or before the Master, service upon the Solicitor in London, by whom such party appears, whether such Solicitor act as principal or agent, shall be deemed good service, *except in cases requiring personal service* (*n*).' It is to be observed, that the effect of the above regulation is to permit service upon the Solicitor in those cases only in which the individual party to be served is not, actually, a party to the suit, and has therefore no Clerk in Court upon whom such service can be made, and that it has been held that the respondents to a charity petition are parties to the proceeding, and therefore do not come within the order (*o*).

Service of warrants upon their Solicitors,

—need not be personal.

Service upon the Solicitor, under the above Order, need not be personal (*p*).

Where Bill taken *pro confesso* after appearance,

The general rule, that all persons having an interest in the result of the proceedings should have notice of the attendance before the Master, extends to cases in which a defendant after appearance to the subpœna, has allowed the Bill to be taken against him *pro confesso*, and a decree to be made, for want of an answer. In such cases, as well as in cases where the decree has been made upon the answer of the party, it is necessary to serve him with warrants upon all proceedings in the Master's Office, by which his interests are in any way af-

—defendant must be served with warrants,

(*m*) Ante, pp. 801, 802.
(*n*) Ord. 1828. XLIV.
(*o*) In re Willoughby's Charity, 6 Sim. 18.
(*p*) 2 Smith, 105.

fected (*q*); and in a recent case, where a decree had been made against a defendant *pro confesso*, and upon the cause coming on before the Master of the Rolls, (Lord Langdale,) for further directions upon the Master's Report, it appeared that the plaintiff had not served the defendant with notice of the proceedings before the Master, under the decree, it was ordered, although no person appeared for the defendant, that the order confirming the report should be discharged and the report taken off the file, and that the account should be taxed by the Master *de novo* (*r*).

Parties entitled to attend.

It is to be remembered that a distinction exists in this respect between decrees *pro confesso* under the Statute for want of appearance, and decrees *pro confesso* for want of an answer. In the former, there being no one whom the plaintiff can serve, all the necessary proceedings must necessarily be *ex-parte* (*s*).

—*secus* where taken *pro confesso* for want of appearance.

But although a party who has appeared, but has allowed a decree to be taken against him *pro confesso* for want of an answer, is entitled to have notice of the proceedings against him under the decree in the Master's Office, he will not be entitled to appear upon such notice before the Master, without previously obtaining an order for that purpose (*t*). This order will not be granted except upon terms, and in *Heyn* v. *Heyn* (*u*), Lord Eldon refused to permit the defendant to attend the Master upon the accounts directed by the decree, unless upon the terms of his paying all the costs of the suit, including the costs of his contempt up to the time of making the order.

Defendant, where Bill taken *pro confesso*, cannot appear without an order, which will not be granted except upon terms.

Parties who are entitled to attend upon the Master, are entitled to take copies of all proceedings in writing brought into the Master's Office, which in any way affect their interest, and will be allowed the costs of such copies in taxation (*x*). Thus, if interrogatories are exhibited for the examination of an executor, or other accounting party, or his examination is left,

Parties entitled to attend, may take copies of all proceedings.

(*q*) King v. Bryant, 3 M. & C. 191; vide etiam Dominicetti v. Latti, 2 Dick. 588; Ante, vol. 1, 698.

(*r*) Parry v. Perryman, Rolls, 13 July, 1838, *ex relatione* E. D. Colville, Reg.

(*s*) Thompson v. Trotter, cited 3 M. & C. 183; and vide ante, v. 1, p. 698.

(*t*) Heyn v. Heyn, Jac. 49.

(*u*) Ubi supra.

(*x*) 2 Smith, 100.

Parties entitled to attend.

or if a debtor or creditor account, or charges and discharges arising out of either, or charges or claims of creditors or others, are brought in, all the parties to the suit, liable to be affected by the results of these accounts or claims, are entitled to take copies of them (*y*). Formerly, no person was at liberty to object to or defend the proceedings before the Master, upon any account, or taxing of costs, but such of the parties as should actually pay for an office copy of such accounts, or Bill of costs from the Master (*z*); and the same rule extended to all other proceedings in the Master's Office upon which a party appeared.

— but are not obliged to do so;

By a recent Act of Parliament (*a*), however, it has been enacted, 'that no person shall be compelled or required to take or pay for any copy of any paper or document in the office of any Master in ordinary, and that every person shall be at liberty to take a copy of such part only as he may require of any paper or document being in the office of any such Master, and of any interrogatories being in the office of either of the Examiners of the said Court; *provided always*, that, in the taxation of costs as between *party and party*, or as between *Solicitor and client*, no person shall be allowed the costs of the copy of any paper or document originating in the Master's Office, or brought in before a Master, unless such copy shall have been either made in the Master's Office, or transcribed from a copy made therein and taken by the party claiming to be allowed the costs of such second or other copy, or unless such copy should have been made for the use of any Master, or of the Court, or by the desire or for the use of the client or clients claiming to be paid for such copy.

and may take copies of such parts only as they require;

but no copy of proceedings in Master's Office to be allowed in taxation, unless taken from Master's Office.

Right to copies extends to all proceedings by whomsoever brought in.

The right to take copies of proceedings in the Master's Office, extends not only to the copies of such matters brought in by the plaintiff, but to such as are brought in by the co-defendants; and, in fact, the right is solely regulated by the influence of the proceeding upon the estate or fund, and the interest of the party claiming to attend in the result of that proceeding (*b*).

(*y*) 2 Smith, 100.
(*z*) 5 Harr. 474.
(*a*) 3 & 4 W. 4, c. 94, s. 19.
(*b*) 2 Smith, 101.

Production of Documents.

Production of documents.

Almost every decree which directs a reference to the Master, either to make inquiries or to take accounts, contains the following direction. 'And for the better (*taking the said account and*) discovery of the matters aforesaid, the parties are to produce, before the said Master, upon oath, all deeds (or books,) papers, and writings, in their custody or power, relating thereto, and are to be examined upon interrogatories *as the Master shall direct'* (*c*).

Discretionary in Master.

It is to be observed, that the words ' as the Master shall direct,' apply to both branches of the direction, viz. to the production of deeds, &c., and to the examination of interrogatories, and that they are considered important as vesting the Master with a discretion upon the subject of production; so that, were they were, by accident, omitted in the decree, they were ordered to be added on a motion for that purpose (*d*).

—who may determine what are to be produced;

This discretion, however, the Master could only exercise, under the old practice, by determining whether there should or should not be any production at all; if a production was ordered, it was in the words of the decree and extended to *all* the books, papers, and writings relating to the matters referred, which were in the custody or power of the party required to make the production; by a recent order (*dd*), however, it has been declared, that where, by any decree or order of the Court, books, papers, or writings, are directed to be produced before the Master, for the purposes of such decree or order, it shall be *in the discretion of the Master* to determine *what* books, papers, and writings, are to be produced (*e*).

—and whether they shall be deposited;

It has been held that, under the general words of the decree above quoted, the Master has authority not only to de-

(*c*) Seton on Decrees, 11.

(*d*) Punderson v. Dixon, 5 Mad. 121.

(*dd*) Ord. 1833, IX.

(*e*) This discretion of the Master, is limited by the rules which guide the Court in compelling a discovery and production of documents in other cases; vide post, ' Interlocutory applications for the production of documents.'

Production of Documents.

termine whether the documents should be produced, from time to time, before him, but also to direct them to be deposited in his office, so long as he thinks that any useful purpose may be answered by their remaining there, and then to allow the party to take them back (*f*). This authority has, since the above cited decisions, been confirmed by the general order last referred to (*g*), which not only directs that it shall be in the discretion of the Master to determine what books &c. are to be produced, but gives him power 'to determine *when and for how long* they are to be left at his office,' or, in case he shall not deem it necessary that such books, papers, and writings should be left or deposited in his office, then he is empowered 'to give directions for the inspection thereof, by the parties requiring the same, at such time and in such manner as he shall deem expedient (*h*).'

—and when and for how long;

and to order inspection instead of production.

It is to be observed that, under the above order, the Master has a right to require, by his warrant, that all such documents as he shall think proper shall be left in his office, and that a refusal to leave them in pursuance of such a warrant, is considered as a disobedience of the original order of the Court directing their production, and may be treated accordingly (*i*).

How enforced.

The mode of proceeding to enforce the production and deposit of documents, is by taking out and serving a warrant in the usual form, underwritten to the following effect;—'at which time the defendant is to produce before me, and deposit in my office, all such deeds, books, and papers as are in his custody or power relating to the matters referred to me.' If any particular documents should have been mentioned in any answer or examination, or in any schedule or other proceeding, they may be referred to in the underwriting to the warrant (*k*); but it is to be observed, that a party can only be ordered to bring in documents specified in any pleading or examination or schedule, or other proceeding, in cases where such plead-

Warrant to produce.

(*f*) Henna v. Dunn, Mad. & Geld. 340; Sidden v. Liddiard, 1 Sim. 388.

(*g*) Ord. 1828, IX.

(*h*) Ibid. This order extends as well to decrees and orders made before, as to those made after the date of the new orders. In re the parishes of Llantrisant, 1 R. & M. 25.

(*i*) Shirley v. Earl Ferrers, 1 M. & C.

(*k*) Bennett's Prac. 78.

ing, &c. can be read as an admission against such party, and that the Master's certificate of a defendant's default in the production of papers, founded on an admission contained in the answer of another party, will be irregular (*l*).

Production of Documents.

Proceedings upon, where party prepared.

If the party is prepared to bring in such deeds, &c., as may be in his possession, custody, or power, a schedule of them should be made out, and an affidavit that the items contained in such schedule, are the only deeds, &c. in the party's custody or power relating to the matters in question, having been sworn, it is deposited, together with the deeds, &c. in the Master's Office, and of this the Master grants a certificate (*m*). It is to be observed, that the certificate of the Master, of the production of the deeds, &c., is merely confined to the fact of the deeds, &c., mentioned in the affidavit having been produced by the party; it does not go on to certify whether the Master is satisfied with the production, nor is it usual to call upon the Master to make such a certificate (*n*). The most convenient course, if there is reason to suppose that the defendant has not made a full disclosure, is to apply for leave to exhibit interrogatories for his examination, supporting the application by an affidavit, stating the papers which he ought to produce &c. (*o*).

Master's certificate.

Not to express whether he is satisfied with the production.

Course where plaintiff is not satisfied.

Where party requires further time;

If the party is not prepared to bring in the documents required, his Solicitor should attend, upon the return of the warrant, and apply for time do so according to the circumstances (*p*); or, if he wishes to take the Master's opinion, under the discretionary power above referred to, as to whether all the documents, &c., should be produced, he should attend the warrant for that purpose, when the Master will direct what documents are to be produced, and fix a time for bringing them in. It seems to be the practice of some Masters, on the return of the warrant, to direct the party, instead of producing the books, to leave an affidavit of what books, papers, &c. he has in his possession, custody, or power, from

or wishes to take Master's opinion, where all or only a part are to be produced.

(*l*) Kemp v. Wade, 2 Keen, 687.

(*m*) Bennett, 79.

(*n*) Cotton v. Harvey, 12 Ves. 391.

(*o*) Ibid. 393; sed query, whether the interrogatories may not be exhibited in the Master's Office, for the examination of the party, without leave of the Court.

(*p*) Bennett, 79.

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which the Master will direct the production of such of them as are necessary (*q*).

Application to the Court,

If a party, ordered to produce documents before the Master, requires further time to enable him to do so, and the Master is not disposed to extend it, he may apply to the Court, by motion (*r*), and having obtained time, he may apply for and obtain a still further extension of time (*s*). He must, however, make such application before he is in contempt; that is, before the period limited by the order *nisi* for the production of the documents has expired, before which time he will not have incurred any contempt, and will not be liable to the costs of the certificate of default or of the order *nisi* (*t*).

—production dispensed with and inspection granted by Court.

It seems, also, that the Court will entertain a similar motion, to dispense with the production of the documents, upon giving inspection at the house or counting-house, &c., (as in the case of an interlocutory order for production,) and, in *Jones* v. *Powell* (*u*), Sir A. Hart, V. C. said, he had known such orders made, and directed an inspection, and that copies should be given at the defendant's expense: the application for such an order, however, should not be made without first applying to the Master to order an inspection, under the discretionary power above referred to (*x*).

Inspection of Bank books.

It may be mentioned in this place, that it is the practice of the Bank of England, whenever it is necessary for the purpose of answering the inquiries directed by a decree, that the Bank books, &c. should be inspected, to permit such inspection, upon production of a certificate by the Master, that such inspection is necessary (*y*). Such inspection, however, will not be allowed, unless upon the production of the Master's certificate, nor will the Court make an order upon the Bank to permit it (*z*). It seems, however, that in case the Master refuses to sign such a certificate, the Court itself, upon a proper case being laid before it, will grant one (*a*).

(*q*) 2 Smith, 156.
(*r*) Vide Hand. 132
(*s*) Ibid.
(*t*) 2 Smith, 132.
(*u*) Seton on Decrees, 421, *ex relatione* Tinney.
(*x*) Ante, p. 308.

(*y*) Brace v. Ormond, 1 Mer. 412.
(*z*) Ibid.
(*a*) Ibid. Orders have frequently been made by the Court, for leave to inspect the books of the Bank and South Sea Company, for the purpose of the suit, although the

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Proceedings in case of default.

If upon the return of the warrant for the production of documents, the party neither produces them nor attends the Master to ask for further time, or to take his opinion upon the propriety of limiting the production, under the discretionary power before referred to; or if, having obtained an extension of time from the Master or from the Court, or having attended the Master upon the return of the warrant, and obtained a limited order for production, (upon which occasion the Master will, as we have seen, fix the time when such production ought to be made,) the party fails to produce the documents within the time limited, the party requiring the production may proceed to enforce it by application to the Court.

Master's certificate.

For this purpose, he should obtain from the Master a certificate of the default, and, upon that being signed (*b*), a motion may be made that he may produce the documents within four days after service of the order upon the Clerk in Court, or that the Serjeant at Arms may go against him, and bring him to the bar of the Court to answer his contempt; this is called the four-day order (*c*).

In *Jones* v. *Powell* (*d*), Sir A. Hart appears to have held, that the Master's certificate, as to the production of books, &c., is one which cannot be excepted to, and that, if any objection

Bank, &c., were not parties. Vide Whorwood v. Scott, Seton on Decrees, 23; Lethieullier v. Tracy, ib. 24; and etiam City of London v. Thomson, 3 Swanst. 265 (n).

(*b*) An order of the Court, dated the 29th October, 1692, (Beames's Orders, 292,) directs, that all reports and certificates shall be filed *within four days after the signing thereof*, and that all proceedings which shall be grounded on any report or certificate not filed as aforesaid, shall be utterly void and of none effect; but, notwithstanding this order, the practice, in cases of certificates of default, appears to be, to apply to the Court for the four-day order, on the day when the certificate bears date, (so as to leave no interval within which the party may obey the decree), and to file the certificate afterwards, taking care, however, not to proceed upon the *four-day order*, until after the filing of the certificate. Indeed, the Registrar in fact never delivers out the four-day order, until the certificate has been filed; Harris v. De Tastet, 1 S. & S. 263; vide etiam Eyles v. Ward, 2 P. Wms. 517.

(*c*) Seton on Decrees, 420. In the case of a Peer or Member of Parliament, the order should be, that he may produce, &c., or that, in default, *a sequestration may issue*. The same course of proceeding is proper, in the case of a Corporation aggregate, vide Seton on Decrees, 428; and, in either case, upon the Master's second certificate of default, the order for the sequestration will be made absolute, ib.

(*d*) 1 Sim. 387.

Production of Documents.

exists to it, the proper course is to move, on affidavit, that the certificate may be quashed. In *Chennell* v. *Martin* (e), however, Sir Lancelot Shadwell, V. C. seems to have considered this opinion as wrong, and to have determined that, in such and all other cases where the objection to the report does not appear on the face of it, if a Master certifies adversely, the objection to his report or certificate should be made by exception, and not by motion or petition; but in a more recent case, *Kemp* v. *Wade* (f), Lord Langdale, M. R. stated, that the Masters had represented to him, that the mode of proceeding in cases of a certificate of default, in not producing deeds, &c., is *for the party applying for the production to obtain the usual four-day order, and then for the other party to apply to the Court to discharge the order, and take the certificate off the file.*

It may be mentioned here, that the certificate of a Muster as to the non-production of documents, cannot be contradicted; and that, where the Master certified that the writings were not delivered in, but the Clerk in Court offered to prove that they were delivered in, the Court would not suffer any averment to be made contrary to the certificate (g).

Modern practice.

Where a party was to produce deeds or writings, or to attend and be examined upon interrogatories before the Master, the ancient rule used to be, to serve him with a copy of the writ of execution (h) of the decree, and shew it him under seal, and at the same time to serve him with a warrant from the Master (i). This, however, appears to have been long since discontinued, and the practice is now, as stated, *viz.*, to serve the party with the warrant for production, &c., without shewing him the writ of execution, and, upon the Master's certificate of default, to obtain the four-day order above mentioned (k).

Four-day order.

How made absolute.

This order is required to be, and must be served upon the Clerk in Court of the party making default (l), *personally*, and

(e) 4 Sim. 340.

(f) 2 Keen, 687.

(g) Sel. Ca. in Cha. 5; 2 Harr. Ed. Newl. 494, n.

(h) This still appears to be the proper course of proceeding, where a party is ordered to produce documents before Commissioners of partition. Vide Trigg v. Trigg, 1 Dick. 325; ante, p 776.

(i) For. Rom. 165.

(k) Ibid.

(l) Ibid. Where a defendant was a prisoner in the Fleet, it was ordered that he should produce the books, &c., before the first day of

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not by leaving it at his seat in the office; and, upon further certificate of default, it will be made absolute, for which purpose another motion must be made in the Court (*m*). This is a motion of course, and may be made without notice, but the certificate of default must bear date on the day of the motion being made (*n*), and must be filed before the order is delivered out (*o*).

Serjeant at Arms.

This order must be executed by the Serjeant at Arms, in the same manner that other orders of that nature are executed by the same officer (*p*), and if he returns *non est inventus*, a sequestration will issue against the estate and effects of the party in default (*q*).

If *non est inventus* returned, sequestration issues.

Where party arrested, he must be brought up.

If the Serjeant at Arms succeeds in arresting the party, he must make a return to that effect, and bring him to the bar of the Court, as directed by the order, when he will be committed to the Fleet; whereupon the Court will of course grant a sequestration, and it seems that the order for the sequestration will be absolute in the first instance (*r*).

Where party in prison.

If the Serjeant at Arms finds the party in prison, he must lodge a detainer against him, and make his return accordingly, when a *habeas corpus cum causis* may be moved for, upon which he will be brought up to the Court, and, upon motion, turned over to the Fleet in the same manner as upon the ordinary process of contempt, and upon that being done, a sequestration may be moved for (*s*).

Sequestration.

Contempt, how cleared.

A contempt incurred by the non-production of documents, pursuant to a Master's warrant under a decree or order, can only be cleared in the same manner as other contempts, *i. e.*, by producing the Master's certificate of the party's having de-

the next term, or be confined a close prisoner in the prison; and, upon the Master's certificate of non-production, a sequestration *nisi* was ordered against him, which was afterwards made absolute, Detillin v. Gale, 1 S. & S. 275, n.

(*m*) Carleton v. Smith, 14 Ves. 180.

(*n*) Ibid.; Hopkinson v. Leach, 3 Swanst. 98.

(*o*) Vide supra, page 811 note (b).

(*p*) Ante, vol. 1, p. 625.

(*q*) Edwards v. Pool, 2 Dick. 693.

(*r*) Ibid.; vide Lupton v. Hescott, 1 S. & S. 274.

(*s*) Ante, vol. 1, p. 630.

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posited the documents required, and moving to discharge the process upon payment of costs.

Power of sequestrators to seize the documents ordered to be produced;

It is to be observed that, in order to render sequestrations issued under the above circumstances more completely adapted to the object for which they are issued, it is provided, by the 1 W. 4, c. 36, s. 15, Rule 16, that where a person shall be committed for a contempt in not delivering to any person or persons, or depositing in Court or elsewhere, as by any order may be directed, books, papers, or any other articles or things, any sequestrator or sequestrators appointed under any commission of sequestration, shall have the same power to seize and take such books, papers, writings, or other articles or things, being in the custody or power of the person against whom the sequestration issues, as they would have over his own property, and that, thereupon, such articles or things so seized and taken, shall be dealt with by the Court as shall be just.

—discharge of prisoner after.

The same rule provides, that, after such seizure, it shall be lawful for the Court, upon the application of the prisoner, or of any other person in the cause or matter, or upon any report to be made in pursuance of the act, to make such order for the discharge of the prisoner, upon such terms, and if it shall see fit, making any costs in the cause, as to the Court shall seem proper.

Documents, when brought in, are to be deposited.

Inspection,

Where the deeds, &c., are brought into the Master's Office, they are usually deposited in a secure box, where all parties wishing to inspect them, or make extracts therefrom, are permitted to do so on taking out the usual warrants for that purpose (*s*). The Master has, however, power, under the 60th Order, above referred to (*t*), to dispense with the deposit of the documents in his office, and to give directions for the inspection of them by the parties requiring the same, at such time and in such manner as he shall deem expedient.

How long to be left.

He has also power to determine when, and for how long, they shall be left at his office (*u*).

Order for their delivery out,

It may be observed, that, if a party depositing documents

(*s*) Bennett, 80.
(*t*) Ord. 1828; ante, p. 807.
(*u*) Ibid.

in a Master's Office, pursuant to a decree or order, should require the use of them, for the purpose of enabling him to put in his examination, he may obtain an order, upon motion or petition, for the delivery of them to him for the purpose (*x*).

to enable party to put in examination.

When the purposes of the production of books, &c., are satisfied, an order may be obtained for the redelivery of them, either by motion or petition (*y*),

When the purposes of their production were answered.

Examination of Parties.

Examination of parties,

We have seen before, that, besides the direction that the parties shall produce before the Master, all deeds, &c., the decree usually goes on to order '*that the parties shall be examined upon interrogatories, as the Master shall direct*' (*z*). This part of the order is seldom omitted, unless where the reference relates to a fact as to which the examination of the parties would not afford evidence, such as the law of another country, &c. (*a*), Where, however, it is omitted in the decree or order, the Master has no power to examine the parties (*b*); but, in such case, if the decree has not been enrolled, the Court will order it to be rectified (*c*),

in the discretion of Master;

The examination of parties under this order is, like the production of documents, in the discretion of the Master, and, in the exercise of this discretion, he may not only refuse to examine a party, but, having examined him, he may re-examine him, *toties quoties*, he thinks proper, without a new order of the Court (*d*).

who may re-examine him *toties quoties*.

Refusal to examine,

If the Master declines to examine any party when required, (which he usually does by refusing to allow the interrogato-

(*x*) Hand, 137: 'it was also ordered, that the plaintiff should have liberty to inspect the documents, whilst they were in the custody of the defendant, at all seasonable times, upon his giving reasonable notice; and when the defendant should have put in his examination, it was further ordered, that he should return the said documents to the Master in the like state and condition as when they were delivered out;' ibid.

(*y*) Hand. 155, 156.

(*z*) Supra, p. 807.

(*a*) Seton on Decrees, 12.

(*b*) Prac. Reg. 199; 2 Ch. Rep. 10.

(*c*) Ante, p. 687.

(*d*) Cowslade v. Cornish, 2 Ves. 270, 1 Dick. 149. S. C.

Examination of Parties.

—must be made the subject of exceptions to report.

ries carried in for his examination,) the proper way of taking the opinion of the Court upon the propriety of the Master's decision appears to be, by waiting till he has made his report, and then taking an exception to it, on the ground of his refusal to examine the party (*e*).

Interrogatories, —by whom carried in.

Interrogatories may, it seems, be carried in by any party for the examination of another party; thus, interrogatories may not only be carried in by the plaintiff, for the examination of the defendant, and *vice versa*, but they may be carried in by one defendant for the examination of a co-defendant (*f*). One executor, however, cannot examine his co-executor to prove that money which he had received, and alleges to have been paid over to his co-executor, had been properly applied by him, as, by such examination, the co-executor would discharge himself also; in such cases the Court prefers leaving it to the executor who has paid the money over to the other, to discharge himself by his oath, to allowing one party to examine the other (*g*).

not signed by Counsel, settled by Master. Form of.

These interrogatories are usually, though not necessarily, prepared by Counsel; it is not, however, necessary that they should be signed by him, as they must be settled by the Master (*h*). As the object of such interrogatories is chiefly to sift the conscience of the party and to obtain admissions from him, they consequently partake more of the nature of the interrogatory part of a Bill, than of interrogatories for the examination of witnesses, and are not subject to the same restrictions as to leading questions, &c.

In creditor's suits.

In *Moore* v. *Langford* (*i*), however, Sir L. Shadwell, V. C., appears to have thought that, in a creditor's suit, where the decree is made in the ordinary form, no special interrogatory for the examination of a defendant ought to be allowed, although a case for directing special inquiries is made on the record.

Where the object of the examination is to obtain the admission of the party as to facts detailed in a state of facts, they generally follow the state of facts in the same manner that

(*e*) Chennell v. Martin, 4 Sim. 340; sed vide Simmons v. Gutteridge, 13 Ves. 262, and post, 819.

(*f*) Simmons v. Gutteridge, 13 Ves. 262; vide etiam Hand. 13.

(*g*) Dines v. Scott, 1 T. & R. 358.

(*h*) Purcell v. M'Namara, 17 Ves. 435.

(*i*) 6 Sim. 322.

the interrogating part follows the statements and charges in a Bill.

Examination of Parties.

The interrogatories, when prepared and fairly copied, are carried into the Master's Office, and the usual warrant 'on leaving' is served, upon the return of which, warrants to settle interrogatories must be taken out and served (*k*). Upon the return of the warrant to settle, the Master, in the presence of the parties, peruses the interrogatories, and finally settles them. The Master's Clerk then has the interrogatories, as settled, properly engrossed, and the Master signs his name at the foot of the engrossment (*l*), after which a certificate of such allowance must be obtained from the Master and filed in the Report Office (*m*).

Must be carried in to Master's Office,

and settled by Master,

and signed by him.

Certificate of allowance.

The proper course for bringing before the Court an objection to the interrogatories as settled by the Master, appears to be, by excepting to the Master's certificate of having allowed the interrogatories, and not by presenting a petition or making a motion to the Court to vary or suppress them (*n*). In *Stanyford* v. *Tudor* (*o*), however, Lord Thurlow held 'that this was not the proper course, and that the party ought to put in such examination as he thought proper, and that if such examination was not sufficient, it should be referred to a Master who would report his opinion; to which report either side might take exceptions, and then the Court, having the interrogatories before it, would determine whether the examination was sufficient or not.' The same opinion is generally considered to have been held by Lord Eldon in *Paxton* v. *Douglas* (*p*); but it is to be observed, that, if such be the result of his Lordship's determination, in that case, it is directly at variance with his former determination in *Hughes* v. *Williams* (*q*); upon an attentive perusal of *Paxton* v. *Douglas*, however, it will be found that the objection to the interrogatories was not on account of their propriety, but of the situation of the party to be examined, which would have rendered him liable, if he answered them, to

Exceptions to certificate allowing interrogatories,

(*k*) Bennett's Prac. 70.
(*l*) Ibid.
(*m*) Ibid.
(*n*) Chennell v. Martin, 4 Sim. 343; Hughes v. Williams, 6 Ves. 459.
(*o*) 2 Dick. 549.
(*p*) 16 Ves. 239.
(*q*) Ubi supra.

Examination of Parties.

a pecuniary penalty: his Lordship therefore, held, that the objection did not properly lie to the question, but to answering it, and that the interrogatories ought, consequently, to be put to the party, leaving it to himself to say, whether he would answer them or not. The same observation will, in some measure, though not to the full extent, apply to the case of *Stanyford* v. *Tudor* (r), there the objection was, to the irrelevancy of the interrogatories. This, as we have before seen (s), is a ground upon which a defendant may, by answer, decline answering the interrogatories in a Bill; and there can be no doubt that, upon a question coming before the Court, involving the consideration whether a party has put in a sufficient answer or not, the Court, in deciding upon it, will take into consideration the relevancy of the interrogatories; still, however, it is submitted that the question whether the interrogatories are pertinent or not, is fairly one which may be brought before the Court by exception to the interrogatories; and that it is strictly the practice of the Court to except to the Master's certificate of allowing interrogatories, can now no longer be matter of doubt, after the decision of the Vice-Chancellor in *Chennell* v. *Martin* (t), supported as it is by that of Lord Eldon in *Hughes* v. *Williams* (u), and by the cases of *The Archbishop of York* v. *Stapleton* (x), and *Strange* v. *Thomas* (y), which are both referred to in his Honor's judgment.

—Form of.

With respect to the form of the exceptions, it is to be observed that, if one general exception is taken to the certificate, because the master ought not to have allowed all the interrogatories, the party excepting will succeed if he shews the Master was wrong in allowing one; but if the exception is 'because the Master ought not to have allowed any of them,' then, if one is proper, the general exception fails as to all (z).

—may lie as well for what the Master strikes out as for what he leaves in,

It is to be noticed, that exceptions will lie to the Master's certificate, as well on account of what he strikes out of the in-

(r) 2 Dick. 549.
(s) Ante, p. 251.
(t) 4 Sim. 423.
(u) 6 Ves. 459.
(x) Cited 4 Sim. 345.
(y) Cited ib. 346, and Seton on Decrees, 14.
(z) Moore v. Langford, 6 Sim. 323; vide etiam Pearson v. Knapp, 1 M. & K. 312, and Cotham v. West, 1 Beavan, 380.

terrogatories, as of what he allows in them (*z*). It seems, however, that if the Master disallows the interrogatories altogether, it is not the practice for him to certify his disallowance of them, but he proceeds to make a report without examining the party (*a*), so that in fact there is, in that case, no certificate of the Master to which exceptions can be taken; the consequence, therefore, is, that the party dissatisfied with the Master's opinion disallowing interrogatories altogether, must wait till the Master has made his report, and then take exceptions to the report on the ground of his having refused to examine the party (*b*).

Examination of Parties.

—but not because he has disallowed them *in toto.*

It has been before stated, that the Master may examine a party *toties quoties* he thinks proper (*c*); for this purpose the Master is at liberty to receive new interrogatories, wherever he may consider it necessary, to the justice of a case, that he should so do, and this he may do even after a motion for the payment of money into Court, upon an admission in the examination to former interrogatories (*d*). And although several instances occur in the books, in which application has been made to the Court for leave to exhibit fresh interrogatories, it seems that such application is unnecessary, and that fresh interrogatories may be received by the Master, without an order of the Court to warrant them (*e*). In this respect, there is a material distinction between the further examination of a party upon interrogatories before the Master, and the further examination of a party as a witness (*f*). There seems, also, to be a distinction between exhibiting further interrogatories for the examination of a party, as to new facts, after his first examination has been put in and completed, and adding new interrogatories, to those already exhibited, upon the examination to the first having been reported insufficient, in order that both sets of interro-

Master may receive new interrogatories at any time.

—without an order of Court;

—but after examination to first found insufficient,

—cannot compel party to answer new interrogatories and old ones at same time, without an order,

(*z*) Archbishop of York v. Stapleton, ubi supra.

(*a*) Chennell v. Martin, 4 Sim. 342.

(*b*) Ibid; and vide Exparte Charter, 2 Cox. 168; sed vide Simmons v. Gutteridge, 13 Ves. 262.

(*c*) Supra, p. 815.

(*d*) Hatch v. ——, 19 Ves. 116.

(*e*) Lynn v. Buck, 3 Mad. 281; Price v. Lytton, 5 Mad. 465; Sidden v. Forster, 1 S. & S. 335.

(*f*) Purcell v. M'Namara, 17 Ves. 434; vide post, p. 839.

Examination of Parties.

—which can only be obtained on special motion.

gatories may be answered at the same time. In such case, it seems that an order of the Court is necessary, in order to justify the continuance of the process of contempt against the party, till a satisfactory answer has been put in to both sets of interrogatories. Such an order, however, cannot be granted of course, as upon the allowance of exceptions to an answer (*g*), but must be made the subject of a special application (*h*).

Examination, how compelled.

The party whose examination is required, is bound, after the Master has settled the interrogatories, to prepare his examination forthwith, and if there is any delay on his part,

Warrant to bring it in;

the Master, on a warrant being served, underwritten, 'At which time the defendant A. is to bring in his examination to the interrogatories settled by the Master,' will fix a day upon being attended by the party or his Solicitor, by which such

—time for, how obtained;

examination is to be brought in (*k*). The time allowed for a party to put in his examination is altogether in the discretion

by application to Master;

of the Master, but a month is the usual time limited, unless under special circumstances; and the practice sometimes is, when the party or his Solicitor attends the warrant, 'to bring in his examination,' and asks for time, for the Solicitor to sign the Master's book, undertaking to bring it in by that

—to the Court.

time (*l*). The party wishing to obtain further time for putting in his examination, may obtain a month by application to the Court upon motion, or by petition to the Rolls, which must be duly passed and served upon the adverse Clerks in Court (*m*). This application appears to be a matter of course, and does not require notice (*n*).

Proceeding in case of default.

If the party neglects to attend the usual warrants, or if, having attended them, the examination is not put in by the time limited by the Master, or by the order of the Court, a certi-

Four-day order,

ficate of such default must be obtained (*o*), and an application

(*g*) Ante v. 1, p. 528.

(*h*) Anon. 3 Atk. 511.

(*k*) Bennett, 72.

(*l*) Ibid. 73.

(*m*) Ibid. It is said, that if when the time fixed by the Master has expired, the party requires further time, he should take out and serve a warrant for further time. 2 Smith, 133.

(*n*) Hand. 138.

(*o*) As to filing this certificate, vide ante, p. 811 n. (b).

made to the Court, by motion, for *a four-day order*, viz., for an order that the party may put in his examination within four days, or, in default, that the Serjeant at Arms may take him into custody, this order, like that for the production of books, &c., must be served on the Clerk in Court of the party *personally*, and not on his agent, and on further certificate of default, it will be made absolute in the manner already mentioned (*p*).

Examination of Parties.

—how made absolute.

In the case of a person having the privilege of Peerage, or of Parliament, or of a corporation aggregate, the order is for a sequestration, instead of a Serjeant at Arms, unless the party put in his examination within a limited time, as in the case of default in not bringing in deeds, &c. (*q*).

In case of a Member of Parliament, —or of a Corporation.

It is to be observed that, although an order *nisi* for a Sergeant at Arms has been made, the party will not be in contempt till it has been made absolute, and that he may, therefore, put in his examination at any time within the four days, and will not be liable to the costs of either the certificate of default, or of the order *nisi* (*r*). It seems also that even after the order *nisi* has been made absolute, and the warrant is in the hands of the Serjeant at Arms, the party may tender his examination, and the Master is bound to receive it, provided the process has not been executed (*s*). The party cannot, however, clear his contempt without payment or tender of the costs occasioned by it (*t*), as in the case of an answer (*u*).

Party not in contempt till four-day order made absolute,

—and may put in his examination.

If the Serjeant at Arms cannot succeed in arresting the party, he must return *non est inventus* upon the warrant, whereupon a sequestration will issue, as it will where the party is arrested and turned over to the Fleet.

Proceeding upon *non est inventus*. Sequestration.

If the party is arrested, he must be brought to the bar of the Court, by the Serjeant at Arms, and turned over to the Fleet. If he is already in prison, the Serjeant must lodge a detainer against him; he must then be brought to the Court by *habeas corpus cum causis*, in the manner before pointed out.

—Upon arrest

—when party already in prison.

(*p*) Ante, p. 812.
(*q*) Ante, p. 811 n.(c).
(*r*) 2 Smith, 133.
(*s*) Seton on Decrees, 423.
(*t*) Ibid.
(*u*) Vide ante, vol. 1, p. 660.

Examination of Parties.

Contempt, how cleared. Upon putting in examination, and payment of costs, —party entitled to immediate discharge; —but may be arrested again, if insufficient.

A party in contempt for not putting in his examination, can only be discharged from his contempt upon the same terms as a party in contempt for not putting in an answer, *i.e.*, upon putting his examination, and paying or tendering the costs of his contempt. Upon doing this, he may move to be discharged: and it is to be observed, that he is entitled to be so discharged, upon putting in his examination, and that he cannot be detained till the sufficiency of the examination has been ascertained (*x*); the party exhibiting the interrogatories may, however, if the examination should be reported insufficient, proceed upon the old process, and obtain another order for the Serjeant at Arms to take the party, without a previous four-days' order (*y*).

Examination, how prepared.

If the party to be examined is desirous of putting in his examination, he should procure a copy of the interrogatories, as settled by the Master, from the Master's Office, and should prepare his examination without delay. For that purpose, if it is necessary that he should have in his possession any documents which he has delivered in to the Master's Office; he may, as we have seen, obtain an order for the re-delivery of them to him for the purpose of enabling him to prepare his examination (*z*).

When necessary documents are in Master's Office.

—signature of Counsel to, not necessary;

An examination, though generally drawn or settled by Counsel, is not necessarily signed by him (*a*), there being no order of the Court, requiring that it should be so, as in the case of a pleading. It is intitled, in the cause, and is described in the heading, as '*The answer and examination of the above-named defendant* [*or plaintiff*], *A. B., to interrogatories exhibited on behalf of the above-named plaintiff* [*or defendant*], *and allowed by* ——, *one of the Masters to this Honourable Court, to whom this cause stands referred, pursuant to a decree made on*

form of;

(*x*) Bonus v. Flack, 18 Ves. 287.

(*y*) Ibid. It is, however, laid down by Lord Eldon, that he cannot do so, if he has accepted the costs of the contempt; this was also the rule of the Court wit' regard to answers, but has been altered with respect to them by the 24th of Lord Lyndhurst's Orders, (vide ante, vol 1, 661.) The order, however, merely applies to answers, and it is still doubtful whether the Court will extend the principle of it to examinations.

(*z*) Ante, p. 814.

(*a*) Bonus v. Flack, 18 Ves. 287; vide etiam Yates v. Hardy, Jac. 223; Keene v. Price, 1. S. & S. 98.

the hearing thereof [*or to an order*], *bearing date the — day of* ——, 18 .'

Examination of Parties.

An examination is in the nature of an answer, and not of a deposition, and is governed by nearly the same rules as answers (*b*). It does not, however, commence with any protestation, but proceeds, at once, to answer the interrogatories *seriatim*, viz., 'To the first interrogatory this examinant *saith*,' &c., and there is no general traverse at the end.

—must be sworn to,

The examination, when prepared, must be engrossed upon parchment, and sworn to, before a Master, who may be either the Master directing the examination, or the Master at the Public Office, in the same way as an answer.

—even in the case of a Peer.

The examination of a Peer must be upon oath, as well as that of a commoner; the privilege which a Peer enjoys of answering upon honour, not extending beyond his answer. (*c*)

When party is of unsound mind.

If the party to be examined is not in a competent state of mind to put in his examination, the usual course is for the Court to appoint some person to put in his examination for him (*d*); but in a case where the plaintiff had filed a Bill to be relieved against a security which he was drawn in to execute, by fraud and imposition, without any valuable consideration, and a decree was made for an account, and that all parties should be examined upon interrogatories,—upon its being represented that the plaintiff was a weak man, and easy to be prevailed upon to say or admit anything that was not true, how much soever to his prejudice, the Court directed that, in case the defendant exhibited interrogatories against the plaintiff, the Master should take care to examine the plaintiff in person, and thereby see that no advantage should be taken of his weakness (*e*).

—or more than twenty miles from London, or sick, it may be taken by commission,

Where the party to be examined lives more than twenty miles from London, or, being sick, is unable to attend at the Master's Office, for the purpose of swearing to his examination, he may have a commission to take it in the country, or

(*b*) Ante, p. 256.

(*c*) Meers v. Lord Stourton, 1 P. Wms. 146; ante, p. 480.

(*d*) Page v. Page, 28 Nov. 1799, 1 Newl. 325.

(*e*) Piddock v. Brown, 3 P. Wms. 288.

Examination of Parties. —upon Master's certificate,

at his own house, for which purpose he must obtain a certificate from the Master, that he considers such a commission necessary (*f*). This certificate is usually granted at the same time, and forms part of the Master's certificate of having allowed the interrogatories (*g*). A party resident in the country is entitled to a commission, although an order *nisi* for a Serjeant at Arms has been made (*h*).

although order *nisi* has been obtained.

Order for commission.

Upon this certificate being filed, an order for a commission may be obtained, as of course, on application to the Court, upon motion or by petition at the Rolls (*i*). The order generally directs, that the party may be at liberty to take out a commission to take his examination to the interrogatories, and that the Clerk in Court for the other party may, in two days after notice of the order, give the Clerk in Court for the party obtaining the order, Commissioners' names, or that, in default thereof, the defendant may have such commission directed to his own Commissioners (*k*). The time of the return of the commission is not mentioned in the order, but is left to the Master's discretion (*l*).

Time for return fixed by Master.

Striking Commissioners' names.

This order must be served in the usual way, and the Commissioners' names struck in the same manner as upon commissions to take answers (*m*). The Commissioners' names being struck, the commission is obtained from the Clerk in Court, who draws it up and gets it sealed in the same manner as a *dedimus*, to take an answer from which it differs little in form, save that a duplicate of the interrogatories must be obtained from the Master's Office, and attached to it (*n*) in the same manner that the *tenor* of the Bill used formerly to be annexed to the common *dedimus* (*o*).

Form of commission.

Duplicate of interrogatories annexed.

Proceedings under Commission.

The manner of proceeding under a commission to take the examination of a party, and of executing and returning it, is in all respects the same, *mutatis mutandis*, as in the case of a commission to take an answer (*p*).

(*f*) Bennett, 74.
(*g*) Ibid. App. 27
(*h*) Anon 1 Vern. 157.
(*i*) Bennett, 74, and App. 27, No. 9.
(*k*) Ibid.
(*l*) Hairby v. Emmet, 5 Ves. 683.
(*m*) Ante, 282.
(*n*) Bennett, 75.
(*o*) Ante, p 284.
(*p*) Vide ante, p, 288.

Examination of Parties.

Examination,

The examination, when taken by commission, is returned to the Six Clerks' Office, in the same manner as a *dedimus* to take an answer, and a copy of it is made, by the Clerk in Court exhibiting the interrogatories (r). When the examination is sworn in London, it is left at the Master's chambers, and a warrant on leaving the same must be taken out and served; in that case the Master's Clerk copies the examination for the party exhibiting the interrogatories (s).

where deposited,

—scandal and impertinence in.

If an examination contains any matter which is scandalous or impertinent, it may be expunged. In order to have this done, under the old practice of the Court, it was necessary, in the first instance, to procure an order to refer it to the Master to examine, and state to the Court whether the examination contained any scandalous or impertinent matter; but, by a recent order (t), it is directed, that 'if any party wishes to complain of any matter introduced into any state of facts, affidavit, *or other proceeding* before the Master, on the ground that it is scandalous or impertinent, he shall be at liberty, without any order of reference by the Court, to take out a warrant for the Master to examine such matter;' and by the same order it is directed, 'that the Master shall have authority to expunge any such matter as he shall find to be scandalous or impertinent.' In order, therefore, to have matter which is impertinent or scandalous expunged from an examination, the party complaining must take out a warrant, as directed by the above order; but as the order applies to all proceedings before the Master, as well as to examinations, the method of proceeding under it will be made the subject of separate discussion in a subsequent part of the present Section. It is, however, to be mentioned in this place, that it is not a matter of course to refer an examination for impertinence, after any proceeding has been had upon it (u). A reference for impertinence ought also, as in the case of an answer, to precede a reference for insufficiency (x).

Insufficiency may be examined into by Master.

Formerly, if a party considered an examination put in by

(r) 2 Smith, 136.

(s) Ibid. 137.

(t) Ord. 1828, LXXIII.

(u) Johnston v. Ure, 2 S. & S. 578.

(x) Ante, p. 296.

Examination of Parties.

another party to be insufficient, it was necessary to obtain an order, referring it to the Master to look into the interrogatories and the examination, and to report to the Court whether the latter had sufficiently answered the former; but, by the order last referred to (*y*), the necessity for such an order has been dispensed with; and where a party wishes to complain, that any examination taken in the Master's Office is insufficient, he is at liberty, *without any order of reference by the Court*, to take out a warrant for the Master to examine such matter.

Without order.

Upon warrant.

But no exceptions are filed.

When an objection is taken to an examination, on the ground of insufficiency, no exceptions are filed, as in the case of answers, but on the return of the warrant 'to consider the insufficiency,' the party complaining must point out the insufficiency, and, upon hearing the opposite party, the Master decides if such examination is, or is not, sufficient (*z*). If the Master considers the examination insufficient, he gives a certificate to that effect, particularizing the interrogatory or interrogatories, or part of an interrogatory, which he considers not sufficiently answered (*a*). If the Master considers the examination sufficient, he must also give a certificate to that effect (*b*). In either case, the proper course to be pursued to obtain the opinion of the Court, upon the Master's judgment, is *by excepting to the certificate* (*c*).

Master's certificate,

—exceptions to.

Form of exception.

It is to be observed, that, where the Master certifies the examination sufficient, an exception in general terms, 'for that the Master has certified the examination sufficient, whereas he ought to have reported it insufficient,' is regular, and that it is not necessary to state in what respect the examination is insufficient (*d*).

Master to consider materiality of question.

It seems that, formerly, the Masters, in deciding upon the sufficiency of an examination, did not always consider themselves at liberty to take into consideration the materiality of the discovery required; but this doubt has been set at rest by the 74th Order (*e*), which directs that the

(*y*) Ord. 1828, LXXIII.

(*z*) Bennett, 76.

(*a*) Ibid.

(*b*) Vide Chalk v. Thompson, 4 Sim. 350.

(*c*) Ibid. et vide Purcell v. M'Namara, 12 Ves. 166; Chennell v. Martin, 4 Sim. 340.

(*d*) Purcell v. M'Namara, ubi supra.

(*e*) Ord. 1828,

Master, in deciding on the sufficiency or insufficiency of any answer *or examination*, shall take into consideration the relevancy or materiality of the statement or question referred to (*f*). 'In considering the sufficiency or insufficiency of an examination upon exceptions to the Master's certificate, the Court will look at it, to see whether there is any *substantial* defect; and not with a critical eye, holding insufficient every examination that is not framed with the strict accuracy of special pleading' (*g*).

Examination of Parties.

Rule of the Court as to.

An insufficient examination, like an insufficient answer, is considered as a nullity; when, therefore, the examination is found insufficient, either upon the Master's certificate, or by order of the Court made upon exceptions to it, the same proceedings may be adopted as if no examination had been put in at all, therefore, if no four-day order, for a Serjeant-at-Arms, has been obtained, it may be moved for upon the production of the Master's certificate, or of the order upon exceptions. If a four-day order has been obtained, but has not been made absolute, it may be made absolute, upon the production of the Master's certificate or order, in the same way as it would have been if no examination had been put in (*h*). And so, as we have seen, if the order has been made absolute, and the party has been arrested by the Serjeant-at-Arms, and discharged upon putting in a further examination; if such further examination is again reported insufficient, the party carrying in the interrogatories may proceed upon the old process (*i*).

Consequence of an insufficient examination.

Where no four-day order has been obtained.

Where a four-day order has not been made absolute,

—when party has been arrested.

From what has been above stated, it will be seen, that the same principles which govern the practice, in the case of insufficient answers, will govern the practice in that of insufficient examinations (*k*); and it seems that this will be extended to cases in which a party so far trifles with the Court as to put in a third insufficient examination, and, that the Court will, upon such occasions, adopt the same practice of ordering the party to stand committed, and to be examined upon interrogatories before the Master, as to the points wherein his

Consequence of a third insufficient examination.

(*f*) Vide ante, p. 255.

(*g*) Per Sir W. Grant, M. R. in Purcell v. M'Namara, 12 Ves. 170.

(*h*) Weston v Jay, 1 Mad 527.

(*i*) Ante, p 822.

(*k*) Weston v. Jay, ubi supra.

Examination of Parties.

examination is reported insufficient, as in the case of a third insufficient answer to a Bill (*l*).

Further interrogatories after insufficient examination.

It is to be recollected, however, that, except in the case above-mentioned of a third insufficient examination, the Master cannot, upon an examination being found insufficient, receive further interrogatories, and compel the party to answer such further interrogatories at the same time that he puts in further examination to the original interrogatories, without an order of the Court, and that such order will not be made by the Court, unless upon special application (*m*).

Costs where the examination is reported insufficient,

If the Master certifies the examination of a party to be insufficient, the party examining may move, upon the Master's certificate, for the costs of, and occasioned by, the insufficiency of the examination (*n*); and it is stated, that where a warrant has been taken out to consider the sufficiency of an examination, and the Master is of opinion that it is sufficient, the Master should so certify, in order that the examinant may apply for his costs (*o*).

—where it is reported sufficient.

Examination of one party may be read by the others.

—but only as against the party examined

Copies of the examination of a party, upon interrogatories, like copies of all other proceedings before a Master, may be taken by all parties to the cause who are interested in them (*p*); and any party to the suit may avail himself of an admission, in such examination, to charge the party examined (*q*). An examination, however, like an answer, can only be made use of as evidence against the party putting it in, and cannot be read as evidence in favour of, or against, any other party (*r*).

—by the Master, though not used by the party examining.

It is to be observed, that a party examining another is not bound to make use of the examination before the Master; if he declines to do so, however, the Master may read it himself (*s*). In fact, the examination is taken for the information of the Master, and the Master is at liberty to

(*l*) Bennett, Appx. 29. C. III. S. 2, Nos. 11, 12; and vide ante, p. 322.

(*m*) Ante, p. 819.

(*n*) Hubbard v. Hewlett, 2 Mad. 469.

(*o*) 2 Smith, 137.

(*p*) Ante, p. , Dyo . v. Anderton, 3 V. & B. 176.

(*q*) 2 Smith, 123.

(*r*) Ibid.; vide etiam Dines v. Scott, T. & R. 358. If the evidence of a party is required before the Master, in favour of or against another party, he may be examined as a witness, subject to the usual objections; vide post, p. 839.

(*s*) Gilbert v. Wetherell, 2 S. & S. 259.

look at it, whether read by the party examining or not, for the purpose of ascertaining the view taken of the case by the examinant, and of seeing how far his statement is contradicted or borne out by the other evidence before him. Upon the same principle, the Court will allow an examination to be read, upon the hearing of exceptions from the Master's report, although it has not been made use of by the party exhibiting the interrogatories before the Master (*t*).

Examination of Parties.

By the Court, upon exceptions.

It may be mentioned here, that where in an examination put in by two co-executors, it was stated, that their receipts had been joint; but it appeared, by affidavit, that such statement was made through mistake and inadvertence, and that one of the executors had, in fact, received nothing, liberty was given to him to put in a supplemental examination to correct the mistake (*u*).

Supplemental examination, —to correct a mistake.

Previously to the promulgation of the New Orders of the 3d April 1828, the power of the Master to examine parties, upon interrogatories, was strictly confined to parties to the record, but by the 72d of the above orders (*x*), this power has been extended to those who become *quasi* parties, such as creditors, or other persons, coming in to claim before him. And it is to be remarked, that the Master is not only authorized, by the order, to examine such persons upon interrogatories, but he may examine them, *viva voce*, or in both modes, as the nature of the case may appear to him to require, the examination being taken down at the time by the Master, or by the Master's clerk, in his presence, and preserved, in order that the same may be used by the Court, if necessary.

Examination of persons coming in upon claims, —upon interrogatories,

—or *viva voce*.

With reference to this subject, it is to be recollected, that the service of the warrants of the Master, or of the orders of the Court upon the Solicitor, in London, by whom such person appears, whether such Solicitor act as principal, or agent, will be good service (*y*). It is also to be remarked, that where

Service upon such parties, —of warrants.

Method of enforcing obedience by.

(*t*) Gilbert v. Wetherell, 2 S. & S. 259.

(*u*) Hewes v. Hewes, 4 Sim. 1, as to correcting an answer by supplemental answer, vide ante, p. 337.

(*x*) Ord. 1828.

(*y*) Ante, p. 604.

Examination of Claimants

a person becomes *quasi* a party upon a claim of this nature, the method of enforcing his obedience to the order of the Court, is different from the course of proceeding against a party to the record. In such cases the Court does not proceed by the ordinary process of contempt, but by immediate committal to the custody of the Warden of the Fleet. When, therefore the four-day order is made for an individual, not a party to the suit, to put in his examination to interrogatories, or to be examined, the alternative should be, not that the Serjeant at Arms be directed to take him into custody, and to bring him to the bar of the Court, but that he may stand committed to the custody of the Warden of the Fleet; in which case, the process will be executed, upon the order *nisi* being made absolute, by the Deputy Warden of the Fleet attending the Court, who will take the defaulter into custody, and hand him over to the Fleet, and there the process stops, as he cannot be proceeded against to a sequestration, that remedy being confined to parties to the suit (*z*).

Evidence.

Evidence before Master.

Where the Court directs an inquiry into a fact, it is in the nature of a new issue joined, and what would be evidence in any other case will be evidence before the Master (*a*).

The parties in the cause are, therefore, at liberty, in an inquiry in the Master's Office, to make use of all the proceedings which are of record in the cause, whether they

Pleadings in the cause,

be pleadings, such as Bills, answers, &c., or in the nature of evidence, such as the depositions of witnesses, or affidavits

(*z*) 1 Smith, 440. It is to be remarked, that the 72nd Order, above mentioned, authorizing service upon the Solicitor of a person who is not a party, directs that such service shall be good service, except in matters of contempt *requiring personal service;* it is presumed, therefore, that the four-day order for putting in an examination, &c., may be served in this manner, as the service of such an order upon a party may, as we have seen, be upon the Clerk in Court. There is, however, no positive decision on the subject; the safest course, therefore, will be to serve the order, personally, upon the individual.

(*a*) Smith v. Althus, 11 Ves. 564.

which have been made use of or filed on former occasions. The pleadings in the cause, may be used before the Master, for the same purposes that they can be used for before the Court, viz., as admissions by the party on whose behalf they are filed. They cannot be made use of as evidence for or against any other party; thus, where the answer of one defendant, against whom the Bill had been dismissed, was permitted by the Master to be read as an affidavit against another defendant, and the Master's report was excepted to on the ground that he had so done, Lord Langdale, M. R., allowed the exception: his Lordship observing, that certainly there is no rule more distinct as to evidence than this, that it ought not only to be evidence in a matter in issue between the parties, but it ought to be the evidence of a person disinterested and giving it for the purpose of declaring the truth, upon the occasion on which it is adduced, but that the answer is an answer which is put in to a Bill, is put in by the defendant for the purpose of maintaining his own interest against that of the plaintiff, not for the purpose of declaring the truth as a disinterested witness between two other parties who are in contest together (*b*).

Evidence before Master.

—for what purpose evidence.

If the admissions already made in the pleadings, are insufficient, the parties may also, as we have seen, obtain further admissions from each other by exhibiting interrogatories under the direction of the Master for their examination, the answers to which interrogatories may be read before the Master as evidence against the parties by whom they are given.

Examinations before the Master.

The Master may also allow any parties who are competent for that purpose, to admit any given facts to be true, and it is directed by an old order of the Court, that if, before the Master, either party by his Counsel, Clerk, or Solicitor, admit a matter of fact, the Master shall take a memorandum thereof, in his book of minutes or memorandums, and the party admitting shall in his presence, subscribe such minutes or memorandums; which subscriptions shall be conclusive to the party, on whose

Admissions by parol before the Master

(*b*) Hoare v. Johnstone, 2 Keen, 553; Kemp v. Wade, ib. 686; vide ante, 403.

Evidence before Master.

behalf the same was so subscribed, so as the other side shall not be put to any proof of the matter (c).

It is to be observed, that the Master ought to take the admissions of such parties only as are competent to make them, and that neither infants nor married women will be bound by admissions to their disadvantage (d).

Proceedings in the cause may be used, whether used before or not.

The right to use the proceedings in the cause as evidence before a Master upon a reference before him, must be understood to be subject to the same rules and restrictions as govern the admissibility of similar evidence before the Court; but if the proceeding has really the character of evidence upon the matter directed by the decree to be inquired into, it may be received as evidence before the Master, whether it was made use of at the hearing or not (e). It seems, also, that the depositions of witnesses in another cause, between the same parties, may be read before a Master without an order to warrant it (f), though, as we have seen, such an order is necessary to authorize the reading of such depositions or proceedings before the Court at the hearing (ff). In *Lubiere* v. *Genou* (g), however, the Master of the Rolls made an order for the reading of the depositions in a cross cause, on an account before the Master, directed in the original cause; but it is to be observed that, in that case, a difficulty was suggested, arising from the circumstance that the cross Bill had been dismissed (h).

Depositions in another cause; may be read without order.

Secus in cross cause, where Bill dismissed.

Affidavits already used in the cause, may be used before Master.

By one of Lord Lyndhurst's Orders (i), the power which exists of reading the depositions in the cause in the Master's Office, has been extended to reading, before the Master, affidavits which have been previously made *and read* in Court.

(c) Prac. Reg. 364. The propriety of adhering to this rule, is exemplified by what took place in East India Company v. Keighley, 4 Mad. 16, in which case, the discussion before the House of Lords was principally upon the point, whether the Master's report that certain admissions were made before him, could be the subject of exception; as to which, vide Lord Eldon's judgment, ibid.

(d) As to how far infants are bound by the acts of persons acting for them in a suit, vide ante, vol. 1, p. 101.

(e) Vide Smith v. Althus, 11 Ves. 564; for this reason, where the proofs in a cause, merely go to charge or discharge a party in a matter of account, when the liability to account is admitted, such proofs are never read or entered as read; vide Law v. Hunter, 1 Russ. 101; Walker v. Woodward, ibid. 109.

(f) Anon. 3 Atk. 524.

(ff) Ante, p. 427.

(g) 2 Ves. 579.

(h) As to reading depositions in cross suits, vide ante, p. 428.

(i) Ord. 1828, LXV.

Evidence before Master.

It is, however, to be remarked that, by this order, it is necessary, to entitle a party to read such affidavits before the Master, under the above order, that they must have been previously *read in Court*. It is also to be observed, that the answer of one defendant cannot be used before a Master as an affidavit against another defendant (*k*). And here it is necessary to call the practitioner's attention to the fact, that, in strict practice, wherever a reference to a Master is directed by a decree or decretal order, under which it becomes necessary to establish facts by the testimony of living witnesses, such testimony ought to be obtained by examination of the witnesses, and that a Master cannot, in any case, proceed upon an inquiry before him upon affidavit, unless by consent of all parties, as the effect of proceeding upon affidavit is to deprive the other side of the power of cross-examination (*l*). For this reason it is, that the Master cannot, strictly speaking, receive affidavits under a decree in which an infant is concerned (*m*). And where a reference had been made to the Master, under the decree, of a question of legitimacy, and the Master proceeded upon affidavits obtained from America, the Vice-Chancellor, Sir J. Leach, on a motion for that purpose, directed the Master not to proceed upon the affidavits, but gave the parties liberty, under the circumstances, to apply to the Court, if by death or otherwise it should become impossible to obtain, under a commission, the evidence of the persons who had made the affidavits (*n*).

Affidavits not to be used upon inquiries directed by decree, unless by consent.

In case of infant.

Effect of 51st Order.

It is to be noticed that, under the 51st of Lord Lyndhurst's Orders which has been before referred to (*o*), the Master is required, at the time appointed for considering the matter of the decree or order, amongst other things, 'to point out whether the matter requiring evidence shall be proved by affidavit or by examination of witnesses,' and that, in a recent case, where the Master had not at that time decided to admit affidavits, but afterwards admitted them, although they were objected to, it was held, upon exceptions to the Master's report, that, as

(*k*) Hoare v. Johnstone, 2 Keen. 553; ante, p. 831.

(*l*) Rowley v. Adams, 1 M. & K. 545; and vide Willan v. Willan, 19 Ves. 590—3.

(*m*) Vide ante, vol. 1, p. 239; but if the infant's Solicitor concurs in the use of affidavits, the infant will be bound, ibid.; vide ante, vol. 1, 102.

(*n*) Tillotson v. Hargrave, 3 Mad. 494.

(*o*) Ante, p. 795.

Evidence before Master.

the Master had omitted to decide, at the time of considering his decree, whether the proofs should be by affidavit or examination, the practice remained as it was before the issuing of the order, and that the exception must be allowed (*o*).

Positive assent not necessary;

It is to be observed that, in the case last referred to, the admission of the affidavits had been expressly objected to by the opposite party. It does not appear, however, that a positive assent to reading affidavits is required; the mere circumstance that a party has allowed affidavits to be used without objecting to them, will be sufficient to prevent his afterwards raising an objection to the Master's report, on the ground that the witnesses ought to have been examined upon interrogatories (*p*).

acquiescence sufficient.

Rule applies only to decrees or decretal orders.

The rule which requires the examination of witnesses upon inquiries before the Master, extends only to decrees or decretal orders,—where the reference is made by motion or petition, in that stage of the cause in which the Court proceeds upon affidavit, the Master may, it is said, do the same (*q*); and so, whenever the matters referred to a Master originate in a summary application, as in petitions in lunacy or bankruptcy, the Master proceeds by affidavit, and the same rule applies to references under petitions authorized by particular statutes where no suits are depending, as in the case of a reference upon a petition under the Stat. 52 Geo. 3, c. 101, which provides a summary remedy by petition in cases of abuses of trusts, created for charitable purposes (*r*).

It is, however, to be observed, that where references are made to a Master upon an interlocutory motion in the cause, for preliminary inquiries, such as inquiries into titles (*s*), or into the amount of principal or interest due upon mortgage, under 7 Geo. 2, c. 20 (*t*), or under the General Orders of the 9th of May, 1839, the Master has the same power to examine

(*o*) Gibbs v. Payne, 4 Sim. 554. From the report of this case, it appears as if the Court considered that the 51st Order empowered the Master, at the time of considering his report, to determine upon the admission of affidavits, even where there was no consent by the other parties. *Sed quære?*

(*p*) Morgan v. Lewis, 1 Newl. 333.

(*q*) Sonnet v. Powell, Seton on Decrees, 22.

(*r*) Exp. Greenhouse, 1 Swanst. 60.

(*s*) Ante, 635.

(*t*) Ante, 637.

witnesses as under a decree (u), and that he is bound, in such cases, by the 51st Order, of 1828, to settle what course he will adopt (x).

Evidence before Master.

By Lord Lyndhurst's orders (y), it is ordered, that where, upon an inquiry before the Master, affidavits are received, then no affidavits in reply shall be read, except as to new matter, which may be stated in the affidavits in answer; nor shall any further affidavits be read, unless specially required by the Master.

Affidavits in reply.

No further affidavits can be received by the Master, after issuing his warrant, on preparing his report (z).

No affidavits received after warrant on preparing report.

All persons who are competent to be examined as witnesses in a cause before the hearing, are competent to give evidence before the Master, upon inquiries directed by the decree, subject, however, to this distinction, that as to those witnesses who were examined in the cause, there must be an application to the Court for leave to examine them, before their examinations can be taken; but as to persons who were not witnesses, they may be examined without such leave (a), and this although the party tendering the interrogatories had not gone into any proof at the former hearing of the cause (b); and although the same matter was in issue, and might have been, though it was not, proved before the decree (c).

Witnesses previously examined in the cause,

The rule above stated, which requires a previous order of the Court, for the examination of a witness before the Master, is founded upon the same reason which requires a special order of the Court to authorize a re-examination of a witness before the hearing (d), viz., the danger of perjury which would be incurred by a witness deposing a second time to the same fact, after having seen where the cause pinches, and how his tes-

cannot be reexamined before Master without order.

(u) Order V. ante, 637.

(x) Woodroffe v. Titterton, 8 Sim. 238. *Quære*, whether the 51st Order, 1828, gives the Master power to settle whether he shall proceed by examination or by affidavit in all references to him, whether by decrees decretal, or interlocutory order, or order under summary proceeding?

(y) Ord. 1828, LXVI.

(z) Ord. 1829, LXIX.

(a) Smith v. Althus, 11 Ves. 564.

(b) Hough v. Williams, 3 Bro. C. C. 190.

(c) O'Neil v. Hamill, 1 Hogan, 183.

(d) Vaughan v. Lloyd, 1 Cox, 312.

Evidence before Master.

timony bore upon it, and the anxiety which the Court therefore feels to prevent improper tampering with witnesses, and inducing them to retract, or contradict, or explain away what they have stated in their former examination upon a second (*e*). For the same reason, also, the Court, although it will generally grant leave for the re-examination before the Master of a witness already examined, will put the party under the terms of having the interrogatories approved and settled by the Master, who, in so doing, will take care that the same witness is not a second time examined to the same facts (*f*). It was said by the Master of the Rolls (Sir J. Leach), in *Rowley* v. *Adams* (*g*), that an order for the examination, before the Master, of a witness, who has been previously examined in the cause, is in general accompanied with a direction, that he shall not be examined to any points with respect to which he has been previously examined; but in *Vaughan* v. *Lloyd* (*h*), which has been before referred to, Lord Thurlow refused to insert any such direction in the order, and expressed a doubt whether the order in *Browning* v. *Barton* (*i*), in which such a direction had been given, was proper. His Lordship, in support of his opinion, said, 'Suppose the witness had been examined in the cause on a mere general interrogatory, under which he might have deposed to the point required, but did not, and a more particular interrogatory was exhibited to get at his testimony, I should think the Master would do right in admitting it. This matter is, therefore, to be judged of by the Master, and, if his judgment is erroneous, you may then come here to have it rectified' (*k*). And this appears to be

—which will only be granted upon the terms that the interrogatories are to be settled by Master,

—who is to take care that witness is not re-examined to same facts;

—but no order that Master shall not re-examine to same facts necessary.

(*e*) Vide ante, p. 585.

(*f*) Vaughan v. Lloyd, 1 Cox. 312.

(*g*) 1 M. & K. 545.

(*h*) Ubi supra.

(*i*) 2 Dick. 508; cited 1 Bro. C. C. 388, sub nomine Browning v. Barker, S. C.

(*k*) In Earle v. Pickin, 1 R. & M. 547, the Lord Chancellor, instead of directing an issue, sent the case to the Master, directing *that the Master should be at liberty to examine witnesses already examined*, and to the same points; but the cause was afterwards brought on upon a motion to vary the minutes, by striking out that direction in the decree, and substituting a direction for an issue. This application was supported on the ground that the direction in the decree, as to the examination of witnesses, was a violation of the settled principles and practice of the Court, and would be pregnant with consequences most dangerous to justice,

now the practice of the Court. But though the Master may not be positively restricted, by the order, not to examine the witness as to points upon which he has been before examined, he is nevertheless bound, in settling the interrogatories, to take care that they do not extend to matter embraced in his previous examination (*l*), unless he is expressly directed to examine as to such matters.

Evidence before Master.

And it seems, in general, that the Court will not, by its order, sanction the Master in examining a witness already examined in the cause, as to matters upon which he has been before examined (*m*), unless in cases where the first examination has failed accidentally, and without fraud, by reason of his having been then incompetent, as in *Sandford* v. —— (*n*), in which case a witness had given evidence under a release executed by him, which, by mere accident, did not cover a very small debt due to him, in respect of which he was interested at the time of his examination, and was, therefore, then incompetent; and the Court made an order for his re-examination before the Master, upon the same point (*o*), *the interrogatories to be settled by the Master* (*p*).

Cases in which Court will permit re-examination to same facts.

The rule restricting the second examination of witnesses to points upon which they have not previously been examined, was further extended by Sir John Leach, M.R., in *Rowley* v. *Adams* (*q*), who allowed a witness, who had been examined in the cause, and had afterwards made an affidavit in support of a state of facts before the Master, to be examined *viva voce* before the Master upon the subject of his affidavit.

When the reason upon which the rule requiring an order of the Court for the re-examination of a witness before a Master, who has been already examined in the cause, does not exist, the rule need not be observed, thus, when the witness has been examined only to prove exhibits at the hearing, he may be examined on interrogatories before the Master, to prove

Witness who has merely proved exhibits, may be re-examined without order.

and the Lord Chancellor ultimately ordered that the decree should be varied, by directing an issue.

(*l*) Sandford v. ——, 1 Ves. jun. 398.

(*m*) Earle v. Pickin, 1 R. & M. 547.

(*n*) Ubi supra; 3 Bro. C. C. 370, S. C.; 2 Dick. 750, S. C.; and vide ante, p. 588.

(*o*) Vide etiam Callow v. Mince, 2 Vern. 472.

(*p*) 1 Ves. 400.

(*q*) 1 M. & K. 543.

Evidence before Master.

other exhibits, without a special order (*r*), and it seems to have been considered that in other cases the strict rule might be relaxed; thus, in *Medley* v. *Pearce* (*s*), it was said, by Lord Hardwicke, that although, according to the strict rule, an order was necessary for the examination of a witness to matters of account before the Master, who had been examined to other facts before the hearing, the practice was otherwise; and in *Swinford* v. *Horne* (*t*), the Vice-Chancellor, Sir J. Leach, is reported to have held that the Master may, without order, examine to different matters a witness who had been examined before the decree, but not to the same matters; but in *Rowley* v. *Adams* (*u*), before referred to, the same learned Judge states the rule to be well settled, that a witness who has been examined in a cause cannot be examined again before a Master without an order. This rule is recognised in *Metford* v. *Peters* (*uu*), by the present Vice-Chancellor, Sir L. Shadwell; and in *Smith* v. *Graham* (*x*), Lord Eldon actually suppressed the deposition of a witness before a Master, who had been examined previously to the decree, with costs, because such deposition had been taken without order.

— but the rule will not be relaxed in other cases.

—it does not, however, prevent a witness being re-examined by the other party.

It is to be observed also, that the rule which prohibits the re-examination, before a Master, without an order, of a witness who has been previously examined in the cause, applies only to prevent a witness from being re-examined by the party who examined him before, and that it does not affect the case where a witness, who has been examined by one side before the hearing, is examined by the other side after the hearing. He is not, in such case, called for the purpose of mending his evidence given before the hearing; and if he does mend it, he is adverse to the party who calls him (*y*).

If witness already examined is re-examined before Master, his depositions may be suppressed.

If a witness who has been examined in the cause is afterwards examined, by the same party, before the Master, without an order, the opposite party may obtain an order to suppress the depositions for irregularity (*z*); such order, however,

(*r*) Courtenay v. Hoskins, 2 Russ. 253.

(*s*) 1 West, 128.

(*t*) 5 Mad. 379, *sed quære* the correctness of this report.

(*u*) 1 M. & K. 543.

(*uu*) 8 Sim. 630.

(*x*) 2 Swanst. 264.

(*y*) Metford v. Peters, Ubi supra.

(*z*) Vide ante, p. 587.

will, if the circumstances justify it, be made without prejudice to any application for the re-examination of the same witness.

Evidence before Master,

In *Greenaway* v. *Adams* (*a*), where witnesses had been re-examined before the Master without an order, but upon different points from those upon which they were examined before, an order was made, that the Master might receive the depositions in evidence. It is to be observed, however, that the application for the order was made by the direction of the Master, and was not opposed; and that Lord Eldon directed that the fact should be specially stated, that notice of the application had been given, and no objection made.

Where they are upon different points, Master permitted to receive them,

—but only when application is not opposed.

With respect to the power, which one party to the record has to examine another party as a witness before the Master, it is to be observed, that the admissibility of a party, as a witness, depends upon the same rules and principles as the admissibility of parties to be witnesses before hearing; for information upon this part of the subject, therefore, the reader is referred to a former part of the present volume (*b*); it may, however, be noticed, that the rule which has been there stated, that a plaintiff cannot be examined by a defendant without his consent (*c*), appears to have been departed from, in *Hougham* v. *Sandys* (*d*), where the Court gave permission to the defendants to examine one of the plaintiffs as a witness, upon the certificate of the Master, that the examination would be necessary for the better prosecuting the inquiries; but it is to be remarked, that the plaintiffs were mere trustees of a sum of money, and had filed the Bill to ascertain the rights of the defendants in the same, and that, consequently, there being no doubt about the liability of the plaintiffs to the payment of the money, which was admitted, and the costs of suit being payable out of the fund, the reasons which prevent the examinationof a plaintiff, as a witness in ordinary cases, did not in that case, exist.

Examination of parties as witnesses,

depends upon the same rules as the examination of parties before decree.

Exception in the case of a plaintiff, or mere trustee.

In order to authorize the examination of a party, who has not been before examined before a Master under a decree, the same order must be obtained as is necessary to authorize the examination of a party before the hearing (*e*).

Previous order.

(*a*) 13 Ves. 360.
(*b*) Ante, p. 446.
(*c*) Ibid.
(*d*) 2 S. & S. 221.
(*e*) Ante, p. 458.

Evidence before Master.

May be obtained, as of course.

In *Franklyn* v. *Colquhoun*(*f*), Lord Eldon said he had always thought, that a motion for one defendant to examine another, was not a motion of course, after a decree; but in *Van* v. *Corpe*(*g*), the Master of the Rolls, Sir J. Leach, after having conferred with the Registrar, said, it appeared to be the practice of the Court that such an order might be obtained as, of course, after a decree, saving just exceptions; his Honor's decision was afterwards confirmed by the certificates of the Secretaries to the Master of the Rolls, and of the Registrars and Six Clerks, and has since received the sanction of Lord Langdale, M. R., in *Paris* v. *Hughes*(*h*).

Secus where party has been previously examined.

This rule, however, will not apply where the party has been previously examined as a witness, in which case a special application will be necessary, as in other cases, and the Master will be directed to settle the interrogatories for the purpose of precluding the re-examination of the party to matters as to which he has been before examined (*i*).

Method of examining witnesses before Master.

The examination of witnesses before a Master is effected, either by exhibiting interrogatories, or by *viva voce* questions, addressed to the witness himself in the Master's presence. The former method is the old practice; the latter was introduced by Lord Lyndhurst's orders (*ii*), and the exercise of it is discretionary in the Master.

Interrogatories

When a party wishes to examine a witness before the Master, upon interrogatories, he must have the interrogatories prepared in the same way as interrogatories for the examination of witnesses in the cause (*k*). They must be signed by Counsel, and when prepared, they must be engrossed upon parchment, and brought into the Master's Office; they are not, however, as in the case of interrogatories, for the examination of parties under the directions of the decree, settled by the Master, unless where they are directed to be so settled by the order of the Court, as in the case of witnesses to

Must be signed by Counsel,

but not by Master, unless specially ordered.

(*f*) 16 Ves. 218.
(*g*) 3 M. & K. 278.
(*h*) 1 Keen, 1.
(*i*) Ibid., and vide Purcell v. M'Namara, 17 Ves. 434.
(*ii*) Ord. 1828, LXIX. LXXII.
(*k*) Ante, p. 466.

be examined, who have been before examined in the cause (*l*). If they are directed to be settled by the Master, the Master must sign his allowance of them in the same manner as he signs interrogatories for the examination of parties (*m*). If they are not to be settled by the Master, he merely marks them as brought into his office.

Evidence before Master.

It seems that the reception of interrogatories for the examination, before the Master, of witnesses who are not parties to the record, or who have not been previously examined in the cause, is not, like the examination of parties, a matter in the discretion of the Master, but that he is bound to receive interrogatories from the parties tendering them, and that the circumstance that the facts, to prove which they are tendered, were in issue, and might have been proved in the cause, is not a sufficient reason for rejecting them (*n*).

Master cannot refuse to receive interrogatories,

—because matter might have been examined into before.

If the Master refuse to receive interrogatories for the examination of witnesses, the proper course seems to be to apply to the Court, by motion, that he may be directed to receive them (*o*). In *Willan* v. *Willan* (*p*), however, the Lord Chancellor ordered the application to stand over, at the same time directing that a petition should be presented, stating the particular circumstances, and the dates.

Method of compelling Master to receive interrogatories.

But, although a Master is bound to permit the examination of any witnesses before him, who have not before been examined, it is to be understood that he is only obliged to do so, when the examination is proposed to be taken at a proper period of the investigation before him; he cannot receive them after other witnesses have been examined and publication passed, without a special order of the Court (*q*), which will only be made upon surprise (*r*), or under the same circumstances as will induce the Court to make such an order after publication has passed before hearing (*s*).

Master not to receive interrogatories, after examination of witnesses closed,

—unless upon special order, which will only be granted in cases of surprise or fraud.

It may be observed here, that according to the ordinary course of practice, the party intending to examine witnesses

Examination should be preceded by a state of facts.

(*l*) Ante, 835; 3 Bro. C. C. 190.
(*m*) 2 Smith, 151.
(*n*) Hough v. Williams, ibid.
(*o*) Ibid.
(*p*) Cooper, 291; 19 Ves. 590, S. C.
(*q*) Ibid.
(*r*) Ibid.
(*s*) Ante, 593.

Evidence before Master.

ought, previously to bringing in his interrogatories, to carry into the Master's Office a state of facts, detailing the circumstances which he intends to prove. This is necessary, in order to enable the opposite party to cross-examine the witnesses, and to know what evidence it will be necessary for him to adduce to support his own case; and it seems, that the examination of witnesses taken before such a state of facts has been brought in, would be irregular (*t*). In general, the state of facts should be brought in by the party supporting the affirmative, but this is a rule of convenience, and a state of facts may be brought in tendering a negative issue, upon which it will be competent, to the party bringing it in, to examine witnesses, in support of his negative statement (*u*). It seems, however, that, in such a case, the other party can only cross-examine the witnesses; he cannot, regularly, adduce evidence in support of the affirmative proposition, without bringing in a counter-state of facts; but in *Willan* v. *Willan* (*x*), where he omitted to do so, and the plaintiff (who was the party bringing in the negative state of facts,) had examined the defendant upon interrogatories before the Master, putting every question that would bring out complete information as to the nature and extent of his claim, and how he was entitled to have it allowed, &c., and had gone on to the examination of witnesses to support his negative state of facts, and had permitted the defendant to examine his own witnesses, to prove the affirmative, without objecting that he had not brought in a counter-state of facts; Lord Eldon held, that the conduct of the plaintiff amounted to a waiver of the objection, arising from there being no state of facts previous to the examination of the defendant's witnesses. The same view was afterwards taken of the practice by the Vice Chancellor in *Trezevant* v. *Fraser* (*y*). In that case, under a decree directing an inquiry into the outstanding estate of an intestate, the plaintiffs carried in a state of facts, charging, that certain sums of money had been lent by the intestate to one of the next of kin, who was a de-

—by whom to be brought in.

Counter-state of facts.

Objection to examination without, how waived.

(*t*) Vide Willan v. Willan, 19 Ves. 590; Cooper, 291 S. C.

(*u*) Ibid.

(*x*) 19 Ves. 590.

(*y*) MSS. V. C. 7th Aug. 1833.

fendant in the cause, and were outstanding in his hands, and examined the defendant upon interrogatories, who, in his examination, set up a case, shewing that the monies alleged to be lent had been given to him by the intestate, which he offered to prove by a variety of documents, which he set out; whereupon the plaintiffs amended their examination, by charging that the alleged documents were forgeries, and proceeded to examine witnesses in support of their state of facts; and the defendant, also examined witnesses, without bringing in a counter-state of facts. Upon a petition to suppress the defendant's depositions, on the ground of irregularity, because there had been no counter-state of facts on his part, the Vice Chancellor held, that the examination of the defendant was a sufficient notice to the plaintiffs of the case intended to be proved by the defendant, and that the plaintiff had waived their right to object to the defendant's evidence, by their acquiescence in his examination of witnesses.

Evidence before Master.

The depositions of witnesses, examined upon interrogatories, under a reference to a Master, may, when the witnesses reside in London, or within twenty miles of it, be taken either by the examiner or by the Master; where they reside above twenty miles from London, they may be taken by commission. In either case, their attendance, for the purpose of examination, may be compelled by *subpœna*, which is in the same form as the ordinary *subpœna ad testificandum* (z), and must be sued out, served, and enforced in the same manner.

Examination of witnesses.

Subpœna ad testificandum.

In strictness, the examination of witnesses, after a decree, upon interrogatories, ought to be taken by one of the examiners of the Court, who formerly examined all such witnesses as the Master thought necessary, unless the Master certified that a commission was requisite (a). A practice, however, has grown up, which authorizes the examination of witnesses, upon interrogatories, in the Master's Office, by the Master himself. This practice originated with a custom, which appears to have prevailed, of inserting in the decree, a direction that the

Examination upon interrogatories before the Master.

(z) Ante, p. 475, vide Ord. 1833.

(a) Parkinson v. Ingram, 3 Ves. 603.

Evidence before Master.

Master should be armed with a commission to examine witnesses, and to direct a commission into the country, if he thought fit (*b*). How it came that such a direction was inserted in the decrees of this Court, does not appear; but it seems, that it was not of course, though it was always inserted, if desired (*c*). The practice, however, appears to have given rise to differences between the Masters and the Six Clerks, and Examiners of the Court, about the right of taking and keeping such examinations, and to whom the commissions and the depositions thereby taken should be returned, &c., in consequence of which, an order was made, dated the 27th February 1667 (*d*), whereby it was directed, that if, upon any reference, the Master should find any particular points or circumstances needful to be proved, to ground his report upon, which were not fully proved, nor could be examined to, before the hearing of the cause, he should then direct the parties to draw interrogatories to such points or circumstances only, and *examine thereupon, in Court, by the Examiners*, if the witnesses shall be or reside within ten miles of London, as by the rules of the Court they ought to do; but that, if further off, and the parties desired it, he might direct a commission into the country, which was to be made out by the Six Clerks, and which said commission, and the depositions thereby taken, were to be returned, unopened, to the respective Six Clerks, who ought to have the keeping thereof, and publication was to pass according to the course of the Court in such cases. And it was declared, that all other examinations in the Court, for the future, not taken and kept of record by the Six Clerks or Examiner as aforesaid, should, from thenceforth be void, and should not be admitted to ground any report, or otherwise made use of in any proceedings in this Court, or at law.

The above order, however, does not appear to have been observed (*e*), and we find the practice of examining witnesses,

(*b*) Parkinson v. Ingram, 3 Ves. 603. Such direction is still inserted in the decrees in the Exchequer, 1 Fowler, Ex. Pr. 224; Seton on Dec. 12.

(*c*) Parkinson v. Ingram, 3 Ves. 607.

(*d*) Beames. Ord. 218.

(*e*) Parkinson v Ingram, ubi supra.

in the Master's Office, expressly sanctioned by another order, dated the 23d June 1687 (*f*), which appears to have been promulgated to prevent the Master's clerks from examining the witnesses, and enjoining 'that every Master himself shall examine all witnesses upon every item of any interrogatory or interrogatories as shall be exhibited before him.' It is obvious, from this order, that it was then the practice for the Master to examine; and in *Parkinson* v. *Ingram*, before referred to, the Lord Chancellor said, he found, by every person he had talked to on the subject, that it was quite settled that the Master, whenever any subject occurs in which he wishes to have the examination of a witness, takes the examination of the witness, and that there is a *subpœna* (*g*); and the Master of the Rolls, who assisted the Lord Chancellor in that case, stated, that he concurred with him, that the Master, if he thinks fit, may examine a witness after a decree.

Evidence before Master.

It is clear, therefore, that the Master has it in his power to examine the witnesses himself, if he thinks proper to do so, although the practice of inserting such a power in the decree, has been omitted, in this Court, for above a century (*h*). The examination of witnesses upon interrogatories, by the Master himself, appears, however, to be of rare occurrence (*i*); and when the Master does think it right to adopt this course, he is bound to examine all the witnesses himself, and he must not permit the examination to be taken by his clerk (*k*). He must also examine the witnesses upon every item of every interrogatory that is exhibited before him (*l*), in the same manner as the Examiner; the depositions should also be kept

—of rare occurrence,

—and must be done by the Master himself, and not by his clerk.

(*f*) Beames's Ord. 285. This appears to be the order alluded to in Parkinson v. Ingram, 3 Ves. 604, under the description of an order made the 23rd June, 3 & 4 James 2.

(*g*) In Parkinson v. Ingram, it is stated, that the subpœna for the examination of a witness, before the Master, is, the same subpœna as to come before the Examiner, but that it is oddly expressed, being in the same form as a subpœna to answer a Bill, but that the label expresses its purpose. A more accurate form of subpœna is now, however, pointed out by the Orders of 1833. Supra.

(*h*) Sanford v. Biddulph, 9 Ves. 30.

(*i*) Handley v. Billing, 1 Sim. 511.

(*k*) Parkinson v. Ingram, ubi supra.

(*l*) Beames. Ord. 285.

Evidence before Master.

by him, and are not to be made known to the parties till the conclusion, *i. e.* the publication (*m*).

Examination by the Examiner.

When the witnesses are to be examined by the Examiner, the interrogatories having been marked by the Master, are to be filed in the Examiner's Office, and the same course of proceeding will there be pursued, as in the ordinary examination of witnesses before decree (*n*).

By Commission in the country.

If the witnesses, or any of them, reside above twenty miles from London, they may be examined by commission. Such commission, however, can only be obtained upon the Master's certificate, that it is necessary (*o*); and if issued without such a certificate, it will be irregular (*p*). It seems that an exception does not lie to this certificate, but that, if it is improperly granted, a motion may be made to discharge the order for the commission (*q*).

This order is made, as of course, upon motion, or petition at the Rolls, upon production of the Master's certificate, and the commission is sued out, in the same manner as commissions for the examination of witnesses before decree (*r*).

By whom the depositions are to be kept.

The depositions of the witnesses, when taken by the Examiner, are kept of record in the Examiner's Office; when taken by commission, they are kept of record by the Six Clerks (*s*), as to the depositions taken before the Masters, in their office, their habit is to keep them there (*t*).

Publication,

It is stated by the certificate of the Six Clerks, mentioned in *Handley* v. *Billinge* (*u*), that where witnesses are examined, after a decree by the Examiner, or by commission, an order must be obtained for their publication, unless it is passed by consent of their clerks in Court; and an order was made by the Court upon that statement of the practice. It appears,

—by order of Court,
—by warrant.

(*m*) Willan v. Willan, 19 Ves. 593.

(*n*) Ante, p. 474.

(*o*) Parkinson v. Ingram, 3 Ves. 603.

(*p*) Bearcroft v. Berkeley, 2 Cox, 108.

(*q*) Chaffen v. Wills, 1 Dick. 377; sed vide Chennell v. Martin, 4 Sim. 342.

(*r*) Ante, p. 489.

(*s*) Beames's Ord. 221.

(*t*) Parkinson v. Ingram, 3 Ves. 607.

(*u*) 1 Sim. 511.

however, that publication may also pass by warrant, and that, when all the witnesses have been examined, the Master will appoint a day for passing publication, by a warrant taken out and served upon the respective Clerks in Court, and also upon the Examiner, underwritten, to 'pass publication of the depositions taken by the Examiner,' after which, Office copies of the depositions will be delivered out (*x*).

Evidence before Master.

Some doubt appears to have been entertained, whether in cases where witnesses were examined by the Master himself, any formal publication take place (*y*); but from the certificate of the Six Clerks, in *Handley* v. *Billinge* (*z*), above referred to, it appears, that when witnesses are examined by the Master, publication passes by his warrant.

Where examination is by Master himself.

When publication passes by consent, it is done by the respective Clerks in Court signing a consent to pass publication in the Six Clerks' Rule Book (*a*). If it should be necessary to enlarge publication, warrants must, before publication has actually passed, be taken out and served upon the adverse Clerk in Court, and also upon the Examiner; and the Master, upon attendance, will exercise his discretion upon hearing all parties interested (*b*).

By consent.

How enlarged;

After publication of the depositions, upon a reference to a Master, a new witness cannot be examined without a special order to warrant it (*c*), which will only be granted upon the same grounds as those upon which the further examination of witnessess after publication, is permitted before the hearing (*d*).

Further examination after publication, not without special order.

The preceding observations with regard to the examination of witnesses after a decree, refer only to the examination of witnesses upon interrogatories, which, previously to Lord Lyndhurst's Orders of 1828, was the only way in which witnesses could be examined in a Court of Equity, unless for the mere purpose of proving exhibits, which, as we have before seen, may be done by witnesses *vivâ voce*. By the 69th of

Examination of witness *vivâ voce*.

Authorized by new orders.

(*x*) 1 Turn. & V. 396.

(*y*) Vide Willan v. Willan, 19 Ves. 591; and Sheppard v. Collyer, cited ib.

(*z*) Ubi supra.

(*a*) Handley v. Billinge, 1 Sim. 511.

(*b*) 1 Turn. & V. 396.

(*c*) Willan v. Willan, 19 Ves. 594; Winpenny v. Courtney, 5 Sim. 554. This extends to the examination of a witness *vivâ voce*. Trotter v. Trotter, 5 Sim. 538.

(*d*) Ante, p. 592.

Evidence before Master.

Master cannot examine *vivâ voce*, witnesses already examined, *Semble*.

the above Orders, however, the power of examining witnesses *vivâ voce* in a more extensive manner, has been given to the Masters, and the Master is thereby empowered, in his discretion, to examine any witnesses *vivâ voce*. It does not appear to have been positively decided, whether the discretion given to the Master, by this order, is limited by the rules before laid down with regard to the examination of witnesses who have been before examined; but in *Rowley* v. *Adams* (e), where the question arose upon the Master's refusal to examine a witness *vivâ voce*, who had been previously examined in the cause, the Master of the Rolls seems clearly to have recognized the rule, that a witness who has been examined in the cause, cannot be re-examined before the Master, without an order, as applying to a *vivâ voce* examination, as well as to an examination upon interrogatories, and made an order accordingly. And it seems, also, that where witnesses have been examined under a decree, and publication has passed, the Master is under similar restrictions as to the examination of witnesses *vivâ voce*; therefore, where, after publication passed, and a warrant on preparing the report had been taken out and served, the Master conceiving that the discretion given him, by the 69th Order, might be exercised at any time, took the examination of a witness *vivâ voce*, the Court, on motion, suppressed the deposition (*f*).

Subpœna to attend Master;

In order to compel the attendance of a witness to be examined *vivâ voce* before the Master, a *subpœna* may be sued out in the same manner as an ordinary subpœna, upon a note from the Master (*g*). The form of the subpœna, is pointed out by the Orders of 1833, and differs little from the ordinary subpœna *ad testificandum*, except that it specifies that the party is to attend the Master, &c.

Warrant to examine *vivâ voce*.

A party wishing to examine a witness *vivâ voce*, must take out a warrant for that purpose, underwritten—'To examine A. B. *vivâ voce*, before the Master,' which must be

(e) 1 M. & K. 543, supra.

(*f*) Trotter v. Trotter, 5 Sim. 338; the objection in this case, was upon two grounds; 1st, because the witness had been examined after publication; and, 2nd, because, under the 67th Order, the Master could not receive any further evidence.

(*g*) Ord. 1828, LXIX.

served upon the Clerk in Court for the opposite party' (*h*). If a subpœna is necessary, he must serve one upon the witness, with the usual note fixing the time of his attendance at the return of the warrant (*i*); at which time the parties must attend the Master, together with the witness. The party calling the witness, examines him, and the other party cross-examines him, and the Master asks such questions as he thinks proper, the questions not being put from written interrogatories (*k*).

Evidence before Master.

Proceedings upon.

By the 69th Order (*l*), authorizing the *vivâ voce* examination of witnesses, it is directed, 'that the evidence upon such *vivâ voce* examination shall be taken down by the Master, or by the Master's Clerk, *in his presence*, and preserved in the Master's Office, in order that the same may be used by the Court if necessary.'

Examination taken down by Master or his Clerk.

It may be observed here, that as the examination *vivâ voce*, takes place openly, before the parties, their Counsel, or Solicitors, the evidence given is fully known, at the time, to the parties interested, and therefore no formal publication of it is necessary.

No publication necessary.

By the 67th of Lord Lyndhurst's Orders, it is directed that the Master shall not receive further evidence, as to any matters depending before him, after issuing the warrant on preparing his report, but that he shall not issue such warrant, without previously requiring the parties to shew cause why such warrant should not issue. This Order has been considered to extend to prevent the Master from examining a witness *vivâ voce*, after issuing the warrant to prepare his report (*m*).

Master not to receive evidence after warrant on preparing report.

State of Facts.

The attention of the reader, has been drawn to the necessity there exists for a party, who intends to examine witnesses before a Master under a decree, to carry in a state of facts, detail-

In what cases necessary.

(*h*) 2 Smith, 150.
(*i*) Ante, p. 477.
(*k*) 2 Smith, 150.
(*l*) Ord. 1828.
(*m*) Trotter v. Trotter, 5 Sim. 383.

State of Facts. ing the circumstances which he proposes to prove (*n*); but as a state of facts is frequently required for other purposes than that of affording a foundation for the examination of witnesses, and is the general form by which the prosecution of every reference to a Master is commenced, it will not be superfluous in this place, to devote a few lines to the consideration of its nature, and of the practice arising out of it.

Form of;

A state of facts, as its name imports, is a statement in writing, made by a party who wishes to prosecute or resist any inquiry before a Master, of the facts and circumstances upon which he relies, either in support of his own cause, or in contradiction or defeazance of that of his adversary. It is, in effect, the '*pleading' of the party before the Master*, and is governed by nearly the same rules and principles as pleadings in the Court, although, not being signed, nor, in general, prepared by Counsel, they are not always so strictly observed. A state of facts, however, must be pertinent to the matter, and must not, any more than any other proceeding in the cause, contain any scandal, and if it is either scandalous or impertinent, the scandalous or impertinent matter may be expunged, in the manner which will be presently pointed out. A state of facts is intituled in the cause, and contains a detail of the facts and circumstances intended to be relied upon by the party; when the party carrying in the state of facts, makes any claim upon the fund in Court, it is usual to conclude the statement with the particulars of the claim, in the manner of a prayer for relief to the Bill, as follows:—'*And the said A. B., therefore, claims, &c.*,' in such case, the proceeding is called '*a state of facts and claim.*' When the object of the party is to charge another with the receipt of money, &c., the state of facts concludes with a charge in the following form:—'*And the said A. B., therefore, charges, &c.*,' in such case the proceeding is called '*a state of facts and charge.*' It may be remarked, that a charge is not always preceded by a state of facts, but if the matter appears from any admissions in any account, or examination or proceeding in the Master's Office, and requires no other proof in support of it, it is usual to make '*a charge*' only.

not signed by Counsel.

Must not be scandalous or impertinent.

When accompanied by claim.

When intended as a charge.

In what cases a charge without a state of facts proper.

(*n*) Ante, p. 841.

When a state of facts is prepared, it is carried in to the Master's Office, and a warrant '*on leaving*,' must be served upon the other parties, who may then apply for and obtain copies from the Master's Clerk; and if they have a counter state of facts to leave, they must proceed in the same manner.

State of Facts.
How carried in.

It is usual to add to a state of facts, a sort of petition, that the party may be at liberty to add to, alter, or vary the state of facts, as he may be advised; and it is presumed, that such form was originally considered necessary, to enable the party to amend his state of facts, after it had been delivered in. It is, however, now an unnecessary form, as a state of facts may be amended at any time, or a further state of facts carried in, upon leaving which, a warrant 'on leaving,' should be taken out and served, as when an original state of facts is left. A state of facts, however, should not be varied or altered after the examination of witnesses has been commenced.

Amendment of state of facts.

Further state of facts.

Of Scandal and Impertinence in the Proceedings.

The readers' attention has been already directed to the necessity for excluding scandal and impertinence from examinations and states of facts before a Master, and the same necessity exists with reference to affidavits, and to all other proceedings in the Master's Office (*o*).

Proceedings in Master's Office, must not contain scandal or impertinence.

Formerly, the course of proceeding to procure the expunging of scandalous or impertinent matter from proceedings in the Master's Office, was the same as that resorted to in the case of scandal or impertinence upon pleadings or other matters before the Court, but by the New Orders (*p*), a somewhat different course must now be pursued.

Master may inquire into, without order;

Under the old practice, the Master had no authority to look into any proceeding before him, for the purpose of ascertaining whether it was scandalous or impertinent, without an order of the Court directing him to do so; and so, if he found that there

(*o*) For the nature of scandal and impertinence, *vide ante*, Vol. 1, p. 452.

(*p*) Ord. 1828,

Scandal and Impertinence in Proceedings.

and may proceed by warrant.

was scandalous or impertinent matter in the proceeding, he could not proceed to expunge it, unless directed to do so by another order; but, by the 73rd of Lord Lyndhurst's Orders (q), it is directed, that 'if a party wishes to complain of any matter introduced into any state of facts, affidavit, or other proceeding *before the Master*, on the ground that it is scandalous or impertinent, he shall be at liberty, *without any order of reference by the Court*, to take out a warrant for the Master to examine such matter; and the Master shall have authority to expunge any such matter as he shall find to be scandalous or impertinent.' Under this order, therefore, it is no longer necessary for a party complaining of scandal or impertinence in a proceeding before a Master, to obtain an order of the Court, directing the Master to look into it, but he may proceed upon it at once, by taking out and serving a warrant to examine into it before the Master. The above order, however, is somewhat deficient, in not pointing out the course to be adopted, after the Master has acted upon the warrant. The order, as we have seen, directs that the Master shall 'have authority to expunge any such matter which he shall find to be scandalous or impertinent,' from which it might be inferred, that the order authorizes the Master immediately to proceed to the operation of expunging. This, however, cannot have been the intention of the framers of the order, as such a proceeding would be most unfair towards the party bringing in the state of facts or other proceeding, by depriving him of all opportunity of taking the opinion of the Court upon the propriety of the Master's decision, it being the well-known rule of the Court, that, after impertinent matter has been expunged, exceptions to a report of impertinence cannot be taken (r). It is presumed, therefore, that the object of the 73rd Order, is merely to do away with the necessity for any order, either to examine into the scandal or impertinence, or for expunging it, and to leave the practice, in other respects, as it existed at the time the 73rd Order was promulgated. If this be the case, the course of proceeding properly is for the Master, having been

Proceeding upon warrant.

(q) Ord. 1828.

(r) Wadman v. Birch, 3 Swanst. 239, n; David v. Williams, 1 Sim. 17; Norway v. Rowe, 1 Mer. 135.

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called upon by warrant to look into the state of facts, &c., to ascertain whether there is any impertinent or scandalous matter in it, to make his report to the Court, in the same manner that he did under an order of reference, for the purpose of affording the other side an opportunity of taking the opinion of the Court, by excepting to his report, and then, if he has reported that there is scandal or impertinence, and no exceptions are taken, to proceed under another warrant to expunge the scandalous or impertinent matter, in the same manner that he did upon the second Order under the old practice (*s*).

Exceptions to report.

It is to be observed that, under this practice, care must be taken to file the exceptions to the Master's report, immediately upon the report being filed, or at least before the time arrives for attending the warrant to expunge; because, after the expunging has taken place, there is no longer any matter upon the record as to which the Court can form an opinion.

It is to be remarked, also, that the 11th of Lord Lyndhurst's Orders (*t*), which requires exceptions in writing to be taken and signed by counsel, in cases of scandal or impertinence, applies only to pleadings or other matters depending *before the Court*, and not to matters in the Master's Office; it is, not, therefore, necessary in proceeding upon scandal or imtinence, in matter before the Master, to take exceptions in writing. It is presumed, however, that if the Master certifies that there is no scandal or impertinence in the matter before him, and exceptions are taken to his certificate, it is incumbent upon the party excepting to point out, by his exceptions, in what particular parts the matter is scandalous or impertinent, in the same manner as was formerly done in cases of exceptions to the Master's report upon references for impertinence in pleadings and other matters before the Court (*u*).

The 22nd Order of 1833 (*x*), directs that, in case of reference

(*s*) This is nearly the course of proceeding pointed out by the XXII. of Lord Brougham's Orders, 1833; but the operation of that Order, is expressly limited to references of answers, or other pleadings or matters depending *before the Court*.

(*t*) Ord. 1828, ante, vol. 1, p. 450.

(*u*) Vide Craven v. Wright, 2 P. Wms. 181; sed vide Mackworth v. Briggs, 2 Atk. 182.

(*x*) Ante, p, 458.

Scandal and Impertinence in Proceedings.

Costs.

of answer, &c., for scandal or impertinence, the Master shall be at liberty, *without further order*, to tax the costs of such references, and consequent thereupon, and to direct by whom they shall be paid, &c., that order, however, applies only to pleadings or other proceedings, *before the Court;* in the case of inquiries as to scandal or impertinence in proceedings in the Master's Office, the Master has no power to tax the costs without an order to that effect; when, therefore, the Master, after having certified that he has found scandalous or impertinent matter, has expunged it, he should certify that he has so done, and then the successful party should move, on the Master's certificate, when filed, for the costs occasioned by the scandal or impertinence (*k*). And so, if the Master is of opinion that the examination is not scandalous or impertinent, he should so certify, as well to enable the party complained against to apply for costs, as to enable the party complaining to except to his certificate. In either case the application is of course, and may be made by motion or by petition at the Rolls (*l*).

Inquiries as to Heirs at Law, next of Kin, Creditors, &c.

Of the general objects of references.

Having directed the reader's attention to the general nature of the proceedings before the Master, and to the powers with which the Master is invested to enable him to perform the duty imposed upon him by the order of reference, it becomes necessary now to point out the course to be pursued in the Master's Office, upon the particular reference before him. The objects, however, for which references to a Master may be made, are so numerous and various, that it would be impossible, in a Treatise of this nature, specifically to detail the course of proceeding which should be adopted in each; all that can be done, therefore, on the present occasion, is, to direct the practitioner to the practice in the Master's Office, upon some of the most usual subjects of reference, from which he will be able, by analogy, to guide his steps upon others which are not of such frequent occurrence.

(*k*) 2 Smith, 136. (*l*) Ibid. 137.

In doing this, I shall, in this place, confine my attention to those references which are usually made by decrees or decretal orders, as those which are made upon interlocutory orders will come more properly under discussion in a future part of the Treatise, when the nature of interlocutory applications upon which they are founded shall be considered.

As to next of Kin, Creditors &c.

Under decrees and decretal orders,

References to the Master upon decrees or decretal orders, are either—1. to make inquiries; 2. to take accounts and make computations; or, 3. to perform some special ministerial acts directed by the Court; to these may be added the taxation of costs; but as the subject of taxing costs will come more properly under consideration when we arrive at the general discussion of costs, which will form the subject of a future chapter (*m*), it will not be now further alluded to than as it comes incidentally under our notice in the discussion of other matters.

—for what purpose directed.

Inquiries by the Master, are directed either to persons or to facts, though some times they are directed to matters of law; but it is, in general, in those cases only where the law comes in as a matter of fact, as in the case of an inquiry into the law of a foreign country, that the Master is ever directed to inquire into the law, the habit of the Court not being to refer abstract questions of law to the opinion of the Masters. Sometimes, however, questions of law are so mixed up with the fact to be ascertained, that it is not possible to decide upon the one without giving an opinion as to the others. In such case, the Master is bound to give his opinion upon the law, as well as upon the matter of fact referred to him; as in the case of a reference to a Master to inquire whether a good title can be made to land, &c.

Inquiries,

The most usual cases in which inquiries as to persons are directed to be made by a Master, are those in which it is necessary to ascertain the heir at law or next of kin of a deceased person. The same sort of inquiry is also frequently directed for the purpose of ascertaining the individuals forming a particular class, such as grandchildren or cousins of a person deceased, or the persons entitled to a share of prize-

—as to *heirs at law*, next of kin, and persons of a class,

(*m*) Chap. of Costs.

Inquiries as to next of Kin, Creditors, &c. — and creditors.

money (*n*). A similar inquiry is also necessary where it is referred to the Master to take an account of the debts due by a particular individual, such account involving, necessarily, an inquiry who the creditors are, as well as into the amount of their claims.

Advertisement for next of kin, creditors, &c., to come in.

It may be noticed, with reference to inquiries of this nature, that in almost every decree by which they are ordered, it forms a part of the usual directions, 'that the Master shall cause advertisements to be published in the *London Gazette*, and such other public papers as he shall think fit, for such next of kin (*o*), [or for the creditors of the said A. B. (*p*),] to come in and make out their kindred, [or prove their debts,] and that he shall fix a peremptory day for that purpose, in default of which they are to be excluded the benefit of the decree.

How obtained.

Where such a direction occurs, the first proceeding to be taken is, to apply at the Master's Office for an advertisement for persons claiming to be heir at law, or next of kin, or creditors to come in (*q*), which having been obtained and signed by the Master, is taken to the publisher of the London Gazette for insertion, copies of it having been previously made for insertion in some of the daily morning or evening papers, as the Master shall direct (*r*). Where the individual, whose debts or next of kin are to be inquired into, died in the country, it is usual to have the advertisement inserted in one or more of the provincial papers where he died; and, should he have died in any of the colonies, the Master usually requires evidence of similar advertisements having been inserted in the Colonial Gazette or other newspapers of the place (*s*).

Where inserted.

Peremptory advertisement.

In about a month's time from the insertion of this, a second advertisement is obtained from the Master's Office, and inserted in the Gazette and other newspapers as before, which is called a *peremptory* advertisement, limiting the day for the creditors or next of kin, &c., to come in and establish their

(*n*) Good v. Blewitt, 19 Ves. 336.
(*o*) Seton on Dec. 72.
(*p*) Ib. 51.
(*q*) If more than one of these inquiries are directed by the decree, separate advertisements are inserted for each.
(*r*) Bennet, 49.
(*s*) Ibid. 50.

claims (*t*). In the case of advertisements in the East Indies or Colonies the first is always peremptory (*u*).

As to next of kin, Creditors, &c.

Limitation of time.

This limitation of the day is made in compliance with the usual direction in the decree, which, as we have seen, directs that parties who do not come in and prove their debts, or otherwise establish their claims before it arrives, shall be excluded the benefit of the decree (*uu*). It seems, however, that notwithstanding this peremptory direction, no objection can be offered to the reception of a charge or claim, by the Master, provided the same is left before the warrant on preparing the report has been issued (*x*). And that, afterwards, although such charge cannot be entertained by the Master, the Court will let in creditors, or next of kin, at any time while the fund is in Court (*y*). And even where the money had been apportioned amongst the creditors (the assets being deficient), and transferred to the Accountant-General, to pay them and the costs of the suit, a creditor, who swore that he was not aware of the decree, was allowed, on motion, to come in and prove his debt, upon payment of the costs of the application, and the expense incident to the same, in recasting the apportionment of the property amongst the creditors (*z*). In *Gillespie* v. *Alexander* (*a*), after the creditors, who had proved, had been paid their debts, and the residue had been ordered to be apportioned amongst the legatees, another creditor obtained leave to go in and prove his debt; but in the meantime the fund was apportioned, and out of it some of the legatees received the shares due to them on account of their legacies, and the remainder was carried over to the account of

Parties admitted after time limited has elapsed.

Where the fund has been apportioned.

(*t*) Bennet, 50.

(*u*) 2 Smith, 109.

(*uu*) It appears that the direction for exclusion has been extended to legatees, (Seton on Decrees, 65). This, however, is incorrect, and in *Anon.* 9 Price, 210, Lord Ch. Baron Richards observed, that the reason why creditors are excluded, unless they should come in within a limited time, is, because they could not be known to the Court or ascercertained, unless they should appear, and parties interested were not to be delayed by the *laches* of the creditors. The same observation will apply to next of kin, but not to legatees, unless they constitute a class, to ascertain which it is necessary to have recourse to advertisements, in which case there must be a direction for exclusion.

(*x*) 2 Smith, 267.

(*y*) Lashley v. Hogg, 11 Ves. 602.

(*z*) Angell v. Haddon, 1 Mad. 530.

(*a*) 3 Russ. 130.

As to next of kin, Creditors, &c.

the other legatees, and Lord Eldon held, that the creditor was not entitled to receive the whole of his debt out of the funds of the other legatees remaining in Court, but only such part of it as should bear the same proportion to the whole, as the legacies given to those legatees bore to the whole amount of the legacies given by the will. His Lordship, however, reserved permission to the creditor to apply to the Court, as he might be advised, against such of the legatees as had received payment on account of their respective legacies, and directed that he and the legatees, out of whose funds he was to be paid in part, should be at liberty to apply to the Court, according to their respective rights and interests, with regard to the testator's estate remaining outstanding, as and when the same should be gotten in and received.

Master should merely notice claims of parties who have proved,

—and not of those who did not come in.

It is to be observed, that when a decree directs inquiries as to next of kin, creditors, &c., with directions that the Master shall fix a day, &c., after which all persons will be excluded the benefit of the decree, it is not usual for the Master, in his report, to notice any creditors except those who come in under the decree. He merely states the claims which have been proved, taking no notice of the possible claims of others, who, whether entitled or not, did not come in (*b*). Where, however, under a decree directing an account of the proceeds of a joint adventure, (pronounced upon a Bill filed by one partner on behalf of himself and all the others,) in which an inquiry was directed as to who were concerned with the plaintiff in the adventure, with the usual direction as to advertisements, the Master not only reported those who had come in, but proceeded to state the names of several other persons, who, though they had not come in, were nevertheless considered by him entitled to shares of the fund; the Master of the Rolls, Sir W. Grant, on further directions, decreed an account to be taken, not only of what was due to those who had come in, but of what sums had been paid by the defendant, before the suit was instituted, to the other persons who were reported to be entitled to shares, but who had not come in, and of what remained in the hands of the defendant, beyond what had been so paid him;

(*b*) Good v. Blewitt, 19 Ves. 336.

but Lord Eldon appears to have held that part of the decree to be wrong, and to have considered that, by analogy to the case of creditors, the parties, who did not come in, ought to be excluded from the benefit of the decree.

As to next of kin, Creditors, &c.

In the above case, Lord Eldon observed, that it was clear, by analogy, that if creditors did not come in, and were excluded from the benefit of the decree, 'that would not prevent another Bill, having due regard to costs, &c.' With reference to this observation, it may be observed, that the rule of the Court is, that the distribution of property, under the decree of the Court, amongst persons found by the Master's report to be entitled, does not conclude the rights of persons who have an equal or paramount title to those amongst whom the distribution has taken place (c); such are only precluded from taking the benefit of the decree under which the distribution has been made, and they may, notwithstanding that decree, file another Bill against the persons who have taken the property under it, to compel them to refund. Thus, after a distribution of the estate of a deceased person has taken place under a decree in a creditor's suit, a creditor, who has not come in under the decree, may sustain a suit against the creditors in an inferior or in an equal class with himself, to compel them to contribute, out of what they have received under the decree, towards payment of his demand. So after a distribution of the property of an intestate, amongst the persons who have been found by the Master's report to be the next of kin of the intestate, persons claiming to be next of kin, either in opposition to, or in conjunction with, those amongst whom the distribution has been made, may maintain a suit against them, for the purpose of compelling them to refund what they have received. Such a suit, however, can only after a distribution, under a decree, be filed against the parties who have partaken of the distribution; it cannot be filed against the executor, or administrator, or other person who has acted under the direction of the Court in dis-

Parties not coming in, not precluded from filing a new Bill, —which must be against those only who have partaken of the distribution

—and not against executor or trustee—

(c) Vide David v. Frowd, 1 M. & K. 200; Gillespie v. Alexander, 3 Russ. 130; Sawyer v. Birchmore, 1 Keen, 391.

As to next of kin, Creditors, &c,

tributing the fund(*d*), for the Court will not permit a party who has acted in pursuance of its decree in distributing a fund, to be afterwards charged for what he has done pursuant to its directions; therefore, after a distribution of assets has taken place under a decree ascertaining the rights of legatees, (in pursuance of which advertisements have been published for all persons interested to come in and prove their claims before the Master,) a Bill, filed by a legatee against the executor, to render him liable for what has been distributed under the decree, will be dismissed, although it appears that the legatee filing the Bill was ignorant of the former decree and proceedings(*e*).

—but must admit the claims established in former suit.

It is to be observed, however, that although a party making a distribution under a decree will be protected in what he has done, and the Court will compel parties claiming a share in the distribution by a new suit, to admit the demand ascertained under its authority in the old suit, to be a just demand, to the extent allowed by the Court in the administration of assets, such parties will not be bound by any account of the assets taken under a decree made in a suit instituted by a single creditor, not on behalf of himself and others (*f*). A creditor, therefore, or a legatee, who is entitled to the assets of a deceased debtor or testator, after payment of the debts, &c., may, after a decree in such a suit, file another Bill against the personal representative for an account of the assets, and although in prosecuting the accounts of such suit, such creditor or legatee will be compelled to allow the demands admitted by the Court in the former suit, he will not be bound by any account of the property taken in his absence(*g*).

This, however, is confined to cases in which the first suit was instituted by a single creditor, for the payment of his own demand alone, and will not be applicable to cases in which the original decree was made in a suit instituted by a creditor,

(*d*) Gillespie v. Alexander, ubi supra.

(*e*) Farrell v. Smith, 2 B. & B. 337; vide etiam Pooley v. Ray, 1 P. Wms. 355; Brooks v. Reynolds, 1 Bro. C. C. 183; 2 Dick. 603, S. C.: and Douglas v. Clay, 1 Dick. 393; Kenyon v. Worthington, 2 Dick. 668.

(*f*) Lord Red. 135, 139.

(*g*) Ibid.

on behalf of himself and others, for a general administration of assets (*g*).

As to next of kin, Creditors, &c.

But although the distribution of property, under a decree of the Court, amongst persons found to be entitled, does not conclude the rights of persons who have an equal or paramount title, yet the Court will not assist such persons who, with full notice of the proceedings in the suit wherein the fund was distributed, have neglected to prosecute their claims; and, therefore, where, after a distribution had taken place in a suit, by the next of kin of an intestate, amongst the individuals who had come in under the decree, and established their claim as next of kin, and, after a lapse of two years from the distribution, a second Bill was filed by persons claiming also to be next of kin, praying that the others might refund, and it appeared clearly, by the evidence, that the plaintiffs in the second suit knew of the proceedings in the first while they were in progress, but neglected to prosecute their claim under the decree, the Master of the Rolls dismissed the second Bill, with costs (*h*).

Persons having notice of former suit, cannot file a new Bill.

It is also to be observed, that when a party, who has not come in under a decree, seeks to compel those who have benefited by the distribution which has taken place under the decree to refund, he cannot proceed against one only for the whole amount of his demand, but he must proceed against them all, in order that they may all be compelled to contribute in proportion to what they have received (*i*); and upon this principle the Court acted in *Gillespie* v. *Alexander* (*k*), before referred to (*l*), where a partial distribution had taken place under the decree, amongst some of the legatees, and there were left in Court certain funds, which were directed to be appropriated to the legatees who had not been paid, and afterwards a creditor obtained permission to go in before the Master, to prove his debt, which he proved accordingly, Lord Eldon was of opinion that the creditor was only entitled to take out of the fund in Court, which had been appropriated

New Bill must be filed against all who have partaken of the distribution.

(*g*) David v. Frowd, 1 M. & K. 200.

(*h*) Sawyer v. Birchmore, 1 Keen, 391.

(*i*) David v. Frowd, ubi supra.

(*k*) 3 Russ. 130.

(*l*) Ante, p. 857.

As to next of kin, Creditors, &c.

to the payment of the unpaid legatees, such a proportion of his debt as the amount of the legacies unpaid bore to the other legacies which had been paid. The principle in *Gillespie* v. *Alexander* (*m*), was afterwards acted upon by Lord Lyndhurst, in *Greig* v. *Sommerville* (*n*), in which a suit had been instituted to administer the personal estate of an intestate, and the Master reported that no debts had been proved; whereupon a decree was made, on further directions, in 1817, apportioning the whole residue amongst the plaintiff and the other next of kin. The plaintiff being an infant, his share, amounting to four-ninths of the fund, was retained, and carried to his separate account; and, in 1825, a foreign prince claiming to be a creditor of the intestate, petitioned for leave to prove his debt against the fund which had been carried to the separate account of the plaintiff, who, coming of age soon after, applied to have the fund paid out,—upon hearing the application, Lord Lyndhurst held, that if the debt should be established, it must be restricted to the proportion which the plaintiff's share bore to the whole amount distributed, and after reserving a sum equal to four-ninths of the claim, he directed the residue of the fund to be paid out to the plaintiff.

Claimants coming in after report must present a petition.

A creditor or other claimant desirous of coming in before the Master to prove his debt or to establish his claim, after a report has been made, must present a petition, stating the reason of his not having come in within the time limited by the advertisement, and praying to be at liberty now to establish his claim (*o*); this petition must be supported by the affidavit of the claimant.

Where he is out of the jurisdiction;

Where a person, who claimed to be a creditor, but had omitted to come in under the decree, resided out of the jurisdiction, and petitioned to have his claim referred to the Master, the Court made the order, upon his giving security for the costs (*p*).

(*m*) 3 Russ. 130.
(*n*) 1 R. & M. 338.
(*o*) 2 Smith, 270.
(*p*) Drever v. Maudesley, 5 Russ. 11.

Contribution to Costs.

Contribution to costs of suit,

It may be mentioned here, that where suits are instituted, by creditors or next of kin or other persons of a class, on behalf of themselves and others of the same class, it is usual for the decree to direct, that persons coming in to prove their debts, or to establish their claims, shall contribute to the expense of the suit. Under a decree of this nature, the plaintiff is bound to claim the contribution from the party coming in, as soon as he has established his right before the Master; if he omits to do so then, he will be considered to have waived it; and, therefore, where a plaintiff's Solicitor refused to attend at the Accountant-General's Office, with the Master's report, in order that the other creditors might obtain their debts, unless they would pay him their proportion of the extra costs of the suit, Sir J. Leach, V. C., held, that the plaintiff, by failing to pursue the decree, and to call for a contribution, had waived all claim to it, and directed the Solicitor to attend the Accountant-General with the report, upon the application of every creditor, on being paid the usual fee of 6*s.* 8*d.* (*q*).

—seldom insisted upon.

It seems that, in practice, the direction for contribution is seldom, if ever, acted upon (*r*), which, as far as relates to creditors,

(*q*) Shortley v. Selby, 5 Mad. 447. When payments are to be made by the Accountant-General to creditors or others, under a decree for apportioning the fund amongst them, the course is, to present the order and office-copy of the report, (which is generally taken by the plaintiff's Solicitor,) to the Accountant-General, who examines the report, to see who are the persons whom the Master has found to be entitled, and what sums he has reported to be owing to each; he then draws checks for the several sums, and writes his initials on the margin of the report, opposite to the sums, to indicate what checks have been drawn. The checks, together with the order and office-copy of the report, are then carried to the Registrar, who, seeing the Accountant-General's initials, and having first compared them with the order and report, to ascertain whether they are drawn for the correct amount, puts his initials to the margin of the report and countersigns the checks, and, unless the checks be thus countersigned, payment of them cannot be obtained; Lechmere v. Brazier, 1 Russ. 72, 76.

(*r*) Vide Bluett v. Jessop, Jac. 243; Lechmere v. Brazier, 1 Russell, 76. Mr. Smith, however,

Contribution to Costs.

is thus accounted for by Lord Eldon: 'as the fund brought into Court, in a creditor's suit, is in part, at least, the fund of all the creditors, and as the taxed costs are paid amongst those who are entitled to it, the plaintiffs and their Solicitor, receive, in effect, the contribution, to which the form of the suit and of the decree gives them a right, without going through a formal process for that purpose' (*s*).

Claims.

Claims, how brought in.

State of facts.

In cases of creditors must be supported by affidavit;

A person coming in to claim, under a decree, whether as heir or as next of kin, or creditor, or as an individual belonging to a class, must commence by bringing into the Master's Office a state of facts, detailing the particulars of his case and the circumstances under which his claim arises (*t*). This state of facts, in the case of a creditor coming in under a decree to prove against his debtor's estate, must be accompanied by an affidavit, from the claimant, that the debt remains due (*u*). *Such affidavit, however, is not intended as Evidence to the Master, in proof of the debt, and must not be used by him as such.*

—meaning of the practice.

'The meaning of the practice is, that a person shall not come here and claim a debt, without giving that assurance that it is due, which arises from his affidavit, which, also, if the debt is contested, affords a protection against the conclusion from other evidence that it is due, when the contrary may be within the knowledge of the party himself; but where the debt is contested, no attention is to be given to the affidavit' (*x*).

Examination of the claimant.

It may be mentioned, in this place, that a plaintiff in a cre-

mentions a recent case in the Master's Office, where security, to the amount of 5*s*. in the pound on the amount of the debt, was called for, before the creditor's charge was allowed to be proceeded upon; 2 Smith, Ch. Pr. 271.

(*s*) Lechmere v. Brazier, 1 Russ. 30.

(*t*) Creditors for small sums of 20*l*. or 25*l*. a-piece or under, are allowed to join in one charge, but separate affidavits by each creditor, in support of their respective debts, are required; 1 Turn. & V. 365.

(*u*) Burroughs v. Elton, 11 Ves. 33; Fladong v. Winter, 19 Ves. 199.

(*x*) Per Lord Eldon, in Fladong v. Winter, ubi supra.

ditor's suit, will be required to prove his debt before the Master, under the decree (*y*); and where the decree directed an account of the estate of the plaintiff's testator, come to his hands, and of his debts, &c., and that the creditors should come in before the Master and prove their debts, and the Master doubted whether he could admit the plaintiff as a creditor to prove a debt due to himself, Lord Hardwick directed that the plaintiff should be at liberty to go in before the Master and prove his debt, and that the Master should examine him relating thereto, notwithstanding he was a party (*z*).

Claims of next of Kin, Creditors, &c.

Warrants.

The state of facts and charge or claim being left, a warrant 'on leaving' must be served, followed by the usual warrant 'to proceed.' If the claim is disputed, it must be investigated before the Master, for which purpose the Master has, as we have seen, the power of examining the claimant, either upon interrogatories or *vivâ voce*, or in both modes, as the nature of the case may require (*a*).

Examination of claimant;

upon general interrogatories,

The ordinary practice, however, under decrees for the administration of assets, is to examine creditors upon a general set of interrogatories, as they bring in their respective claims; though a particular creditor, may be examined on a particular set of interrogatories to meet his case (*b*); in either case, it seems, that the interrogatories must be settled by the Master.

—upon particular interrogatories.

Evidence.

If it should be found necessary to examine any witness, either for or against the claim, such witness may be examined, either upon interrogatories or by the Master *vivâ voce*, at his discretion, as before pointed out.

—generally upon affidavit.

It seems, however, that in supporting charges in the Master's Office, the strict rules of evidence are, by mutual understanding, frequently dispensed with, and that bonds, deeds, notes, and other securities, are almost invariably proved by affidavit, recourse being had to the examination of witnesses in very contested cases only, or where fraud is suspected (*c*).

(*y*) Seton on Decrees, 55.

(*z*) Newman v. Norris, 1 Dick. 259.

(*a*) Ante, p. 829.

(*b*) 1 Newl. 333; 1 Turn. & V. 366.

(*c*) 2 Smith, 301.

Claims of next of Kin, Creditors, &c.

Defence.

It may be observed here, that where a person, not a party to the suit, carries in a claim before the Master, under the decree, the party representing the estate out of which the claim is made, has a right to the benefit of any defence which he could have made, if a bill had been filed by the claimant in Equity, or an action had been brought at law to establish such claim.

Statute of Limitations.

Therefore, as we have seen, an executor may, in the Master's Office, set up the Statute of Limitations as a bar to a claim by a creditor under the decree, provided such claim was within the operation of the Statute before the decree was pronounced (*d*).

Want of consideration.

So also, if it is objected that a person is not a creditor for a valuable consideration, that question may be entered into in the Master's Office, and afterwards come before the Court upon exceptions (*e*).

Effect of Statutes of Limitations.

With reference to the effect of the Statute of Limitations, in barring a claim brought in by a creditor under a decree, it may be mentioned that in *Sterndale* v. *Hankinson* (*f*), it was determined that where a bill is filed, by a creditor, on behalf of himself and all others, every creditor has an inchoate interest in the suit from the moment the Bill is filed, and, from that moment, time does not run against him; so that a simple contract creditor, coming in under a decree made in such a suit, was admitted to prove, although there had been a lapse of more than six years between the filing of the Bill and the decree. It is to be observed, however, that the case occurred before the recent Statute (*g*), and that the claimant was, moreover, a creditor by simple contract. Since that period, however, the Statute 3 & 4 W. 4, c. 27, s. 40, has been passed, which operates as a positive bar to all actions, suits, or *other proceedings*, for the recovery of any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at Law *or in Equity*, or any legacy, but within twenty years next after a present right to receive the same shall have accrued, &c.; and it

(*d*) Ante, p. 157. It seems also, that the Statute may be set up in the Master's Office as well by another creditor or legatee, as by the personal representative, ibid; Shewen v. Vanderhorst, 1 R. & M. 317; sed query, whether it can be set up by the Master? ibid.

(*e*) Per Lord Hardwicke, in Peacock v. Monk, 1 Ves. 127—131.

(*f*) 1 Sim. 393.

(*g*) 3 & 4 W. 4, c. 27.

has been held that a petition for leave to go in under a decree, to prove a debt before a Master, is *a proceeding* within the meaning of the above section (*h*). The effect of the above altertion in the law, therefore, is to prevent all debts being proved before the Master, under a decree, after the period limited by the above section, in cases where they operate as charges upon land or rents and all legacies, leaving, however, the case of simple contract debts upon the footing on which they stood previous to the Statute.

Claims of next of Kin, Creditors, &c.

Allowance of claim.

Where the Master is satisfied that the claim is properly made out, he marks the state of facts as "*allowed,*" and it will then form an item in his report (*i*), and the opinion of the Court upon the propriety of the Master's determination may be taken by excepting to the report allowing the claim.

Supplemental Bill, where necessary.

Where the Master has admitted the claim of a creditor, he becomes *quasi* a party to the suit: it is not, however, necessary to bring him before the Court by supplemental Bill. Where the Master finds that persons are next of kin who are not parties to the record, the strict practice is, to make them parties, by filing a supplemental Bill against them. It seems, however, that this may be dispensed with, where there is already one person on the record who his next of kin, provided the others are willing to attend, as if they were on the record; this, however, cannot be done where the claim on behalf of the next of kin is not raised on the record, and none of the next of kin are *in that character* parties to the suit (*k*). A creditor or next of kin, or other claimant, if the Master disallows his claim, or he has any other ground for dissatisfaction with his decision, may except to so much of the report as relates to his claim (*l*); and it is to be observed that, in a creditor's suit, if the Master disallows the claim of the plaintiff, and exceptions are taken to the report, the Court will not, pending the exceptions, take the conduct of the cause from the plaintiff (*m*).

Right of claimant to except to report,

(*h*) Berrington v. Evans, 1 Y. & Col. 434.

(*i*) Bennet, 54.

(*k*) Waite v. Temple, 1 S. & S. 319; Ante, v. 1, p. 309.

(*l*) 1 Turner and V. 366; and vide Gregg v. Taylor, 4 Russ. 279.

(*m*) Jeudwine v. Agate, 5 Russ. 283.

Claims of next of Kin, Creditors, &c.

It is to be noticed, that the method of objecting to the Master's report upon a claim, by exceptions to the report, applies to those cases only in which the Master has taken the claim into consideration and disallowed it;—where the Master refuses to entertain the claim at all, either from a doubt as to his power to investigate it under the decree, or for any reason, the proper course appears to be, to apply to the Court by motion or petition. Thus, where, under the usual decree for an account on a Bill by creditors, the Master refused to proceed upon a claim by the surviving partners of the testator, in respect of the balance of certain dealings between the testator, in his individual capacity, and the partnership firm, from a doubt whether he had the power to examine into such claim under the decree, the Court entertained a motion, to refer it to the Master to take the account (*l*).

—does not extend to cases where Master refuses to entertain claims.

Costs of establishing claim.

With respect to the costs of persons coming in to establish their claims under a decree, the general rule appears to be, that creditors and next of kin going in before a Master as such, pay the expenses of so doing; but that, if, after having established their claims, they are permitted to mix in the cause as if they had been parties, then, in respect of such proceedings, they may be entitled to their costs (*m*). In *Harvey* v. *Harvey* (*n*), the Vice-Chancellor held, that although a creditor, who proves before the Master, has, generally, no costs, yet if the proof is beneficial to the estate, as where he saves by it the expense of a suit, and there are extraordinary costs, the Court will give them to him. It seems, however, that, in the case of creditors, the rule above stated only applies where there is likely to be a surplus of the fund in which other parties are interested; where the fund is insolvent,

(*l*) Vide Paynter v. Houston, 3 Mer. 297.

(*m*) Waite v. White, Mad. & Geld. 110; vide etiam Watkins v. Maule, Jac. 107; Abell v. Screech 10 Ves. 355, overruling Maxwell v. Wettenhall, 2 P. Wms. 27; Orwell v. Lord Hinchinbrooke, 10 Ves. 356 n.; and Skeene v. Pepper, ib. n.

(*n*) Mad. & Geld. 91.

and therefore is wholly divisible among the creditors, they will be allowed the costs of proving their debts (*o*).

Claims of next of Kin, Creditors, &c.

In *Watkins* v. *Maule* (*p*) it was held that a creditor whose proof was disallowed by the Master, but afterwards admitted by the Court, was not entitled to costs, though the Master of the Rolls, Sir T. Plumer, appeared to think that, if the case had been reversed,—if the Master had decided in favour of the creditor, and the executor had been the appellant, and had been in the wrong, the creditor, being in the right, might be considered entitled to be paid the costs occasioned by an improper appeal.

Inquiries as to Legacies and Annuities.

Inquiries as to legacies and annuities.

It is to be observed, that the course of proceeding by advertisements to invite persons having claims to come in under a decree, is resorted to in those cases, only, in which it is unknown who the parties are, who may have such claims, or rather where it is possible that claimants may exist besides those who are already known. When all the persons who can claim are ascertained, or capable of being ascertained, without such a proceeding, it will, of course, be unnecessary to resort to it; therefore, when the Master is ordered to take an account of the legacies or annuities given by a will, no advertisement need be inserted in the Gazette or public papers for such legatees to come in (unless the legacy is given to persons constituting a class, in which case it may be necessary to ascertain, by advertising, who the parties constituting that class are), because the legacies or annuities will appear by the will. A list of the legacies or annuities, in the form of a state of facts of legacies, &c., and a copy of the will, is generally required by the Master, upon which the usual warrant 'on leaving,' 'to proceed,' must be obtained and served (*q*). If any of the legatees have been paid, it is necessary that their receipts, and the legacy-duty receipts for each legacy, should be produced, to authorize

No advertisements necessary.

But list, &c., must be brought in.

(*o*) Anon. Rolls, 28 June, 1828, Seton on Dec. 56.

(*p*) Jac. 105.

(*q*) Bennett, 50.

As to Facts.

the Master to report that such have been paid; and the same observation will apply to annuities (r).

Inquiries as to Facts.

Inquiries as to facts.

Affirmative state of facts.

Negative.

Counter state of facts.

The cases in which the Master may be directed to make inquiries into facts, are so numerous and various in their nature, that it is impossible to point out the rules by which each inquiry is to be pursued in the Master's Office. All that can be done, on the present occasion, is to remind the practitioner of what has been before stated, viz., that the state of facts ought to be brought in by the party supporting the affirmative (s), though, as we have seen, a negative state of facts has been permitted (t). Where another party affirms the fact to be different from the fact as alleged by party carrying in the state of facts, the party so affirming must bring in a counter state of facts. A counter state of facts, however, is not necessary where one party merely negatives the facts as alleged by the other.

Inquiries as to Titles.

Inquiries as to Titles

It has been already stated, that the habit of the Court is, not to refer abstract questions of law to a Master, and that, except in cases where the matter of law comes in question as matter of fact, as in the case of inquiries into the law of foreign countries, that a reference as to the law of a case is ever made. Still, however, there are many cases in which questions of law are so strongly involved in the facts into which the Master is directed to inquire, that the Master cannot report upon the fact without also expressing an opinion upon the law as it affects the matter before him. The most ordinary instance of this occurs where a reference is made to a Master to inquire into the title of a party to property in question in the cause.

(r) Bennett, 50.

(s) Ante, p. 811.

(t) Ante, p. 842.

As to Titles.

References of this nature are principally made in suits for the specific performance of contracts or agreements for the sale or purchase of estates; and, as they are in the nature of a preliminary inquiry, they may be made either by decree or by order upon motion (*u*). Inquiries into titles are, however, not confined to suits for specific performance, but may occur incidentally in suits having other objects; as, where a Bill is filed, by creditors or persons claiming under trusts, to have trust estates sold, and a sale having taken place under the decree, the purchaser procures an order to refer it to the Master to inquire into the vendor's title (*x*).

No state of facts necessary.

When an inquiry is directed as to a title, it is not necessary to carry in a state of facts, but the Master proceeds upon the abstract (*y*). If a decree or order has been obtained by the vendor, he must take his abstract to the Master's Office, at the same time that he leaves the order or decree. If the decree or order has been obtained by the vendee, and an abstract has been already delivered, he must, in like manner, carry the abstract so delivered into the office. If no abstract has been delivered, an application may, if necessary, be made to the Court, by motion, that the vendor's Solicitor may deliver an abstract of the title to the vendee's Solicitor (*z*). When the abstract is left in the Master's Office, the usual warrant 'on leaving,' and afterwards 'to proceed,' must be taken out, and served (*a*).

Abstract,

—delivery of, how compelled.

Must be examined with the deeds by Solicitor.

When the abstract is brought in, the Solicitor of the vendee should carefully compare the abstract with the title deeds, for which purpose, if necessary, the production of such of them as are in the custody or power of the vendee, or of any other parties to the cause, may be compelled, in the manner already pointed out (*b*). The Master, however, always proceeds upon

(*u*) Ante, p. 634.

(*x*) Vide post, 'Sales of Estates.'

(*y*) Bennett, 153.

(*z*) 1 Turn. and V. 417.

(*a*) Ibid. It is to be recollected that in cases of sales under the decree of the Court, the Master will only allow the vendor's Solicitor to attend before him, upon the investigation of the title. Ante, p. 801.

(*b*) Ante, p. 808. The seller is bound to produce the title deeds mentioned in the abstract, in order that the abstract may be examined with them, although they are not in his possession, and the purchaser is not entitled to the custody of them. But if they are in the possession of a third person, the purchaser's Solicitor, it seems, must

Inquiries as to Titles.

Master proceeds upon abstract alone, —unless vendee insists upon production of documents.

the abstract only, upon which alone he makes his determination, unless the vendee insists upon the production of the title deeds, the Master, as well as the Court, always taking it for granted that, whenever the vendee omits to call for the production of the title deeds, he is satisfied that the abstract is correct. Upon this ground, an exception to a Master's report upon a title to copyholds, because no surrender had been produced before him, was overruled (*c*).

Objections.

On litigated questions of title, written objections to the abstract are brought into the Master's Office by the party objecting, and the Master is either attended by Counsel on both sides, or the written opinions of Counsel upon the abstract, already given, are produced to him, according to circumstances (*d*).

Master may direct abstract to be laid before a Conveyancer.

In cases of difficulty, the Master seldom takes upon himself to decide intricate questions of title. He usually directs the abstract to be laid before a Conveyancer, upon whose opinion he exercises his own judgment in reporting to the Court. In such cases, the original abstract, with instructions, in writing, by the Master's Clerk, 'to advise on the title, by the direction of the Master,' with a copy of the order of reference, and the objections taken by the purchaser, with the vendor's answers thereto, are taken by the Solicitor, and laid before a Conveyancer, and when he has given his opinion thereon, the abstract must be returned to the Master's Office, by the Solicitor who left it (*e*).

Practice approved by Lord Eldon.

It may be mentioned in this place, that the right of the Master to send the abstract of a title before him, to a practising Conveyancer, was questioned before Lord Eldon, in *Flower* v. *Walker* (*f*), and appears to have received his Lordship's sanction.

In the prosecution of the order for reference, the Master, in his discretion, may examine the parties upon interrogatories (*g*), receive evidence upon affidavit, or by the examina-

send to the place where the deeds are, in order to examine them with the abstract, and the seller must pay the expense of the journey. 1 Sugden, V. & P., 149.

(*c*) Poole v. Shergold, 1 Cox, 160.
(*d*) Bennet, 154.
(*e*) 1 Turn. & V. 418.
(*f*) 1 Russ. 408.
(*g*) Vide, ante p. 815.

As to Titles.

tion of witnesses before him, either upon written interrogatories or *vivâ voce*(*h*). He may also call for such deeds and other muniments as are necessary to the elucidation of the title.

Report.

If the Master is satisfied with the title, as shewn by the vendor, he reports accordingly. If he is not satisfied with the title, he must state the points in which the title is defective (*i*). And it is to be observed that the mere circumstance that since the contract a suit has been instituted by other parties, and is pending, in which part of the lands are claimed adversely to the vendor, is not a sufficient ground for reporting against a title (*k*).

Where there are incumbrances,

Where the title is clear, but there are terms, or incumbrances, to be got in, the Master should report in favour of the title (*l*). Before he does so, however, he ought to be satisfied that the terms, or incumbrances, can be got in. If he is not satisfied upon this point, he should report that a good title cannot be made, unless the terms, &c., can be got in.

—which cannot be got in;

In *Esdaile* v. *Stephenson* (*m*), where it appeared that the estate was subject to a rent charge, and a term to secure it, and the purchaser's Counsel, before the Master, required the seller to produce a release of it, or evidence that the jointress would release, which however, was not done, and the Master reported that the seller could make a good title, upon the jointress releasing—Upon exceptions to the report, the Vice-Chancellor consulted the Lord Chancellor, and stated their joint opinion to be, that the report was wrong. *It should have been, 'that the seller could not make a good title, unless the jointress joined;'* and the Vice-Chancellor recommended, in future, the form of such a report to be, that the seller could *not* make a good title, because A. is a jointress, and no sufficient evidence has been produced to shew that she will release.

—or which can be got in within a reasonable time.

It may be observed here, that a purchaser cannot, upon a report of a defective title, insist upon being discharged, if the

(*h*) Ante, p. 815.

(*i*) Green v. Monks, 2 Moll. 325. For information as to what may be considered as good title, vide 1 Sugden V. & P. 329.

(*k*) Osbaldeston v. Askew, 1 Russ. 160.

(*l*) Bennet, 152.

(*m*) Mad. & Geld. 366; Sugden V. & P. 219.

As to Titles.

title is capable of being made good within a reasonable time; therefore when it appears, by the report, that the vendor, on getting in a term, or getting in administration, &c., will have a title, the Court will not discharge the purchaser, but will put the vendor upon terms to complete his title speedily (*n*).

Where title cannot be speedily completed.

It will not, however, do so when it appears that the vendee will have a long time to wait; and in *Whittaker* v. *Whittaker* (*o*), where Sir Robert Mackreth wished very much to be discharged from his purchase, Lord Kenyon would not hold that the vendor was to be bound during six years, while all Mr. Wilkinson's affairs were winding up (*p*).

Reference back to Master, to review his report,

If the Master reports in favour of a title, and any new fact afterwards appears, by which the title is affected, the Court will refer the title back to the Master, upon application by motion, even after the Master's report has been confirmed (*q*).

—after report in favour of title

So if the Master reports in favour of a title, but upon hearing exceptions, the Court thinks the evidence not sufficient to support the Master's finding, it will, upon application of the vendor, refer it back to the Master, to review his report, in order to give the vendor an opportunity of producing further evidence (*r*). And even after the exceptions have been heard, and the Master's report has been overruled, yet the seller may, upon an early application, obtain a reference back, in order to shew that the title is valid, upon another ground, not before taken (*s*); and, in general,—where the Master has, by expressing an opinion in favour of the title, prevented the vendor from shewing, that if his opinion had been otherwise, still the title was good,—the course

(*n*) Coffin v. Cooper, 14 Ves. 205; sed vide Lechmere v. Brasier, 2 J. & V. 289, in which Lord Eldon said, he would not extend the rule, which the Court had adopted, of compelling a purchaser to take the estate where a title is not made till after the contract, to any case to which it had not already been applied.

(*o*) 4 Bro. C. C., 31; vide 10 Ves. 599.

(*p*) Per Lord Eldon, in Coffin v. Cooper, ubi supra.

(*q*) Jeudwine v. Alcock, 1 Mad. 597.

(*r*) Andrew v. Andrew, 3 Sim. 390.

(*s*) Egerton v. Jones, 1 R. & M. 694; Portman v. Mill, ib. 697.

As to Titles.

of the Court appears to be, to send it back to the Master to review his report, the party moving paying the costs of the motion (*t*).

After report against title.

So where it appears, at the hearing of exceptions to a report, against a title, that the seller can clear up the objections, the Court has sometimes sent the title back to the Master, to review his report (*u*); and it has frequently occurred, even at the hearing of the exceptions to the Master's report, that, if the vendor can satisfy *the Court*, that he can make a good title by clearing up the objections reported by the Master, the Court will make a decree in his favour, without a reference back (*x*). Thus, where the Master reported that a good title could be made, except as to so much of the estate as a widow was entitled to in respect of her dower, she refusing to join in the conveyance to a purchaser, the Vice-Chancellor said, that if, at the hearing on further directions, the vendor should be prepared to cure the objection which was reported by the Master, he would be in time to do so; but he required an affidavit that the widow was ready to release (*y*).

Where objection can be at the hearing.

In *Esdaile* v. *Stephenson* (*z*), however, which has been before referred to, the Lord Chancellor and Vice-Chancellor agreed, that, if a title upon a new fact can be made between the report and the further directions, the Court will enforce the contract, as if, in the above case, the jointress had agreed to join when the cause came on for further directions. In such a case, the Court will expect Counsel to appear, and consent that she would concur (*a*).

It is to be observed, however, that, in the above case, it was expressly laid down, that the Court would not allow a seller to lie by, before the Master, and then, upon further directions, attempt to make a title (*b*).

(*t*) 1 Sugden V. & P. 219.

(*u*) Ibid.

(*x*) Ante, p. 634.

(*y*) Paton v. Rogers, Mad. & Gel. 256.

(*z*) Ante, p. 873.

(*a*) Sugden V. & P. 220. 'This points out the necessity, in such cases, of setting down the cause upon further directions, at the same time with the exceptions. In Esdaile v. Stephenson, as the exceptions only were before the Court, they were ordered to stand over, with liberty to set down the cause for further directions, and then the exceptions and further directions to come on together. *Ibid.*

(*b*) Sugden V. & P. 20.

As to Titles.

After exceptions overruled new objections cannot be made.

Secus where exceptions allowed.

If exceptions are taken to the report, 'that a good title can be made,' and are overruled, other objections to the title cannot be made, but if exceptions are allowed, and a new abstract of title is delivered, further objections may, of course, be brought in (*c*). Thus, in a case where the seller of a leasehold estate produced the leasehold title, which the Master thought sufficient, and reported accordingly, but the Court held that the lessor's title ought to have been produced, and sent it back to the Master, to review his report; the seller having liberty given him to produce the freehold title, it was considered that the purchaser was at liberty to enter into objections to the leasehold title, which were not taken upon the former discussions before the Master, and upon the objections being afterwards taken, the Bill was dismissed (*d*).

Inquiry as to time when good title shewn.

It has been before stated (*e*), that the Court has adopted the practice, at the same time that it refers it to the Master to inquire into the vendor's title, to direct him, in case he shall be of opinion that a good title can be made, to inquire, and state to the Court, when it was first shewn that it could be made. With reference to this part of the inquiry, it is necessary to observe that, although in *Lord Braybrooke* v. *Inskip* (*f*), Lord Eldon stated, that—'as to the question when the abstract was complete, the abstract is complete whenever it appears that, upon certain acts done, the legal and equitable estates will be in the purchaser; that may be long before the title can be completed;'—this must be understood to apply only to cases in which the title is outstanding, in persons who are trustees for the vendor, or whom the vendor has any means of compelling to concur; but when it is necessary, in order to make the title complete, that a person, over whom the vendor has no control, should join in the conveyance, such a title will not be considered complete, unless it can be shewn that the party has actually conveyed. Thus when, in order to

(*c*) Brooke v. ——, 1 Mad. 212.

(*d*) Fildes v. Hooker, 1 Sugden V. & P. 219, n., 2 Mer. 424, S. C.; 3 Mad. 193, S. C.

(*e*) Ante, p. 635.

(*f*) 8 Ves. 436.

complete a title, it was requisite that a recovery should be suffered by a person who was not a trustee for the vendor, or one whom he had any legal right to call upon to execute it, and the recovery was not actually completed, till a few days after the filing of a Bill for specific performance, although the deed making the tenant to the *præcipe*, and the warrant for suffering the recovery, were executed before, it was held that a good title was not shewn before the commencement of the suit (*g*).

As to Titles.

It may be observed also, that when the abstract shews the legal estate to be outstanding, and that the persons in whom it is vested would necessarily be trustees for the vendor, it will not be a complete abstract, unless it shews who the persons are in whom the legal estate is vested (*h*).

Method of taking Accounts.

Former practice.

According to the practice of the Court, as it existed previously to the Orders of 1828, the usual course of proceeding under decrees to take accounts in the Master's Office, was for the plaintiff, in the first instance, (where it was necessary,) to examine the accounting party upon interrogatories, and then, from the defendant's examination, and from his answer, and the schedules thereto, or from the other evidence or papers in the cause, to prepare a charge against him, *i. e.*, a statement of the several items which the plaintiff claimed to be entitled, upon proof, to charge the defendant in the account (*i*). This charge was left with the Master, and the different items in it were investigated in the Master's Office. When the charge was gone through, the defendant brought in his discharge, containing a statement of payments and disbursements made by him, and other matters, by which he claimed to discharge himself from the debt attempted to be made out against him by the charge (*k*). An attempt to simplify this process has, however, been made by the orders above referred to (*l*), by the 61st

Practice under New Orders.

(*g*) Lewin v. Guest, 1 Russ. 325.

(*h*) Wynne v. Griffith, 1 Russ. 283.

(*i*) 1 Newl. 329.

(*k*) Ibid.

(*l*) Ord. 1828, LXI.

Debtor and Creditor Account. [illegible]

of which it is directed, 'that all parties accounting before the Master, shall bring in their accounts in the form of debtor and creditor, and any of the other parties who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party upon interrogatories, as the Master shall direct (*m*). The effect of this order is, to render it unnecessary to proceed, in the first instance, by examining the accounting party upon interrogatories, by which the expense of the interrogatories, and of the examination, is frequently saved (*n*).

The account is generally annexed by way of schedule to an affidavit verifying its contents, and if the party does not bring it in within a time to be fixed by the Master, he may be proceeded against, in the same manner as a party not putting in his examination (*o*).

On the account being left, the usual warrant on leaving, &c., must be served, and if, upon taking a copy of the account, the party calling for the account is not satisfied with it, he may exhibit interrogatories for the examination of the accounting party, under the direction of the Master (*p*).

The account having been taken in, and the party, if necessary, examined, a charge must then be carried in by the party conducting the inquiry (*q*). This charge (*r*) is usually a transcript of so much of the debtor and creditor account as sets forth the receipts, to which may be added any additional items with which it is intended to charge the accounting party.

It is to be observed here, that although the 61st Order directs the parties accounting before a Master, to bring in their accounts in the manner there prescribed, it is not always ne-

(*m*) The next order goes on to direct that all such accounts, when passed, and settled by the Master, shall be entered in a book to be kept for that purpose, in the Master's Office, as is now the practice with respect to Receiver's accounts, and with proper indexes, in order to be referred to as occasion may require. Ord. 1828, LXII. It has been held, that when accounts entered into this book, as prescribed by the above orders, are afterwards copied into schedules, annexed to the Master's report, such schedules are only to be charged at the rate of 6*d*. per folio, like Receiver's accounts. Attorney-General v. Lubbock, 1 M. & C. 264.

(*n*) 2 Smith, 114.

(*o*) Ante, p. 821.

(*p*) Ord. 1828, LXI.

(*q*) 2 Smith, 115.

(*r*) As to the nature of a charge, vide ante p. 850.

Charge.

cessary to call upon them to do so. If sufficient appears from the admissions of the party to be charged, either in his answer or the schedule to it, or in any proceeding in the cause, to enable the account against him to be properly made out, the party conducting the proceeding may immediately bring in his charge, without calling for any account under the 61st Order. The charge being left, warrants '*on* leaving' 'and to proceed on the charge' are taken out, and served on the Clerks in Court of all persons interested in the account (*s*). On the return of the warrant, the charge is compared with the debtor and creditor account, or with the answer or examination, or the schedules annexed to them, put in by the accounting party, and if the charge is found to accord with them, it is allowed without further evidence. If the charge includes sums not admitted in the account to have been received, they must be substantiated, either by evidence or by admissions in the examination of the party charged, or in his answer or the schedules thereto (*t*). The charge being established, is marked by the Master 'allowed' (*u*).

Further charge, may be brought in as often as necessary,

It may be mentioned here, that a party conducting an account before the Master is not limited to one charge. If, after his charge is allowed, he discovers other items, with which the accounting party is chargeable, he may either amend his charge, or carry in a further charge, and this he may do as often as may be necessary. In *Napier* v. *Staples* (*x*), in Ireland, under a decree for an account, the plaintiff had examined the defendant on three successive sets of interrogatories, and had filed a charge, which he amended three times, and had then sued out a commission and examined witnesses. He afterwards filed a further charge, and, after various delays, applied to the Master of the Rolls for liberty to file a sixth, which was refused; but, upon appeal, the Lord Chancellor, Sir A. Hart, gave him leave to file it, observing—'I am not aware that there exists any rule, such as has been assumed, that, in taking the account, a uniform series of proceeding is to be followed,—a charge, discharge, and examination, and the subject

(*s*) Vide ante, 801.
(*t*) Vide 2 Smith, 116.
(*u*) Bennet, 84.
(*x*) 1 Moll. 228.

Charge.

is then dropped.'......' It is not the course, in England, to comprise every thing in the first charge; on the contrary, in the majority of cases, the plaintiff, after he has brought in his charge, looks to the examination of the defendant to furnish him with further items; the Court always taking care, and this is the true principle, to indemnify the opposite party, and to guard against vexatious irregularity, by making the party pay all the costs incurred through his irregularity or delay.' His Lordship afterwards said—' I do not lay any stress upon the point, whether the plaintiff knew of the existence of this item or not; I think that is not material. Equity would not deserve the name, if it acted on a form to shut out a just claimant, because he came late, whether his doing so was optional or involuntary. But the same equal justice that admits the plaintiff's further charge, gives the defendant a further opportunity to discharge himself, and the order must be so. The defendant must have an opportunity of explaining his case, by evidence, and his denial of the receipt of this sum, by affidavit, will have very great weight in determining it' (*y*).

defendant must account for receipts subsequent to decree.

It may be stated here, that it is the constant practice of the Court, in decrees against a mortgagee, or against an executor to account, to direct it without *future* words; and yet, if the person decreed to account, receive any thing subsequent to the decree, it may be inquired into before the Master, and the defendants, in each case, must bring the sums so received to account (*z*); the consequence of this rule is, that, in decrees of this nature, the practice generally is, where the matter has been long pending in the Master's Office, since the first charge against the accounting party was brought in, to examine again, upon interrogatories, just before the Master is prepared to make his report; and then, if it appears that he has received any thing subsequent to his last examination, to carry in a further charge.

and further charge may be brought in thereon.

Discharge.

Proceeding where party omits to bring it in.

When the charge has been allowed, the accounting party must carry in his ' discharge' (*a*). If he does not do so within

(*y*) 1 Moll. 231.

(*z*) Bulstrode v. Bradley, 3 Atk. 582; vide etiam Bell v. Read, ib. 592.

(*a*) And so if a plaintiff carries in a further charge or an amended charge, the defendant must have an opportunity of carrying a fur-

Discharge.

a reasonable time after the charge has been allowed, the party conducting the account must take out and serve upon him a warrant, underwritten '*at which time the said A. B. is to bring in his discharge,*' &c. This warrant is peremptory, and if it is not obeyed, or the accounting party does not appear and crave further time, the Master may proceed, if otherwise in a situation to do so, to make a report, without the discharge, charging the defendant with the whole amount of the charge as allowed (*b*).

Form of.

This discharge is usually a transcript from the payments he has made, as stated either in his debtor and creditor account, or in his answer or examination, or the schedules attached to them, and a warrant on leaving and to proceed should be taken out upon it and served in the usual manner. A discharge, as well as any other matter before the Master, may be the subject of an examination for impertinence (*c*). The accounting party is bound to use all due diligence in obtaining and attending warrants to vouch his discharge; or, the party interested in the account may take out warrants to compel his attendance for that purpose (*d*): and if, upon the return of such warrants, the party does not attend and proceed, or account, to the Master's satisfaction, for his not proceeding, the Master will disallow the discharge, or such part of it as the party has omitted to support. The Master, however, will, if he sees the party anxious, and that he does his best to support his discharge, afford him every indulgence (*e*); and, in *Ridifer* v. *O'Brien*(*f*), where an executor was unable to produce sufficient evidence before the Master in support of his discharge, the Master, in his report, stated the payments insisted upon in the discharge, and that he had not allowed them, as no sufficient evidence had been produced before him to warrant that allowance, *but that he had received them as a claim,* and an exception to his report was overruled.

Impertinence in.

How prosecuted.

The account is vouched, by the production of the proper

—substantiated by vouchers,

their discharge, and of explaining his case by evidence. Vide Napier v. Staples, ubi supra.

(*b*) 2 Smith, 121.

(*c*) Price v. Shaw, 2 Cox. 184.

(*d*) Bennet, 85.

(*e*) 2 Smith, 121.

(*f*) 3 Mad. 13.

Discharge.

vouchers, such as receipts, &c., which documents, when produced, are marked either by the Master or his Clerk, with the initials of his name, as a token of his inspection or allowance of them. It seems, that the party producing vouchers does so at his peril, and that the Master is bound to admit them in evidence, unless the other side can lay a reasonable ground to shew that the voucher in question can be impeached, of which the Master is to judge (*g*).

Where voucher not disputed.

In a case in Ireland, Sir Anthony Hart, L. C., states the practice in England, where the item exceeds 40*s.*, for the executor to produce the voucher, and to verify, by affidavit, the payment of the sums therein specified; and then, if no objection is made, the Master gives the executor credit in the account.

Where objected to.

But if any party objects, the Master then requires the affidavit of the person who received the money; and, if this cannot be had, he then requires the affidavit of some person to verify the signature of the voucher (*h*).

Vouchers must be produced, although items are stated in answer which has not been replied to.

It is to be observed, that the necessity for producing the proper vouchers in support of the discharge, is not removed by the circumstance of the defendant's answer, in which the items are sworn to, not having been replied to; although, in other cases, an answer which has not been replied to, is to be taken as true. The Master must, nevertheless, require the vouchers to be produced (*i*).

Usual course of proceeding in support of discharge by affidavit.

It may be mentioned here, that the ordinary course of proceeding upon discharges in the Master's Office, is by affidavit; and though, in strictness, in cases where infants are concerned, all evidence should be upon examination by interrogatories, yet still, as we have seen, if the Solicitor for the infant acquiesces in the reception of affidavits, the infant will be bound by it. In a case in Ireland, before Sir A. Hart, L. C. (*k*), where an infant was interested, an order appears to have been made by his Lordship to restrain the defendant, who was an executor, from issuing a commission to examine

(*g*) Earl of Lonsdale v. Wordsworth, 28 May, 1789: cited Bennet, 85.

(*h*) Bingham v. Lady Clanmorris, 2 Moll. 20.

(*i*) Davenport v. Davenport, 1 Sim. 512.

(*k*) Young v. Reynolds, 2 Moll. 21 n.

witnesses in aid of his account, and he was ordered to verify, by affidavit, the several vouchers on which he sought credit.

Discharge.

All vouchers produced before a Master must be stamped with the proper stamp applicable to the instrument, otherwise they will be rejected. When a voucher has been produced and allowed, the Master or his Clerk marks it with the initials of his name, as a token of his inspection and allowance of them (*l*).

Vouchers must have proper stamp.

Should any item occur, which cannot, at the moment, be satisfactorily explained, or the voucher for it produced, it is marked as a *queried* item, for further inquiry; and should there be any such item remaining when the others are disposed of, a warrant is obtained and served, by the plaintiff's Solicitor, and underwritten, '*to proceed on the queried items in the defendant's discharge;*' on the attendance upon which, such explanation as may be given, and the evidence adduced, in support of the queried item, is discussed and read (*m*). If the defendant does not attend and support the queried items, or crave further time, the whole of such items may be disallowed by the Master, or he may direct a further warrant to be taken out to give the party an opportunity of setting himself right before he proceeds to disallow the payment (*n*).

Of queried items.

Warrant to proceed upon.

Although, strictly speaking, every payment insisted upon in the discharge, where it amounts to forty shillings and upwards, must be established by a proper voucher, sums under forty shillings may be substantiated by the oath of the accounting party (*o*). This rule appears to have been adopted from analogy to the rule at law in accounts, and as it is not sufficient at law, that the party should swear, to his belief only, that the money

Where sums amount to forty shillings and upwards, no voucher necessary.

(*l*) Bennet, 85.

(*m*) Ibid.

(*n*) 2 Smith, 121.

(*o*) Anon. 1 Vern. 283; Marshfeld v. Weston, 2 Vern. 176; Bingham v. Lady Clanmorris, 1 Moll. 20; Everard v. Warren, 2 Cha. Ca. 249; but although a defendant in account shall be discharged by his oath of sums under forty shillings, a party shall not, by way of charge, charge another party so, ibid.; vide etiam Marshfield v. Weston, 2 Vern. 176. In Whicherley v. Whicherley, 1 Vern. 470, the Court having been informed that the course of the Court was, that an accountant was to be allowed, on his own oath, all sums not exceeding forty shillings each, so as the whole sum was not above £100, declared the rule seemed very unreasonable, and would consider how to rectify it.

Discharge.

has been paid, but he must swear to the fact; so, in accounts under decrees in equity, it is not sufficient to swear that he believes he paid the money, but he must peremptorily swear to the fact (*p*).

Effect of charging defendant by means of an account containing a discharge.

But although it is the general rule that every item in a discharge, of forty shillings and upwards, must be supported by a proper voucher, there are cases in which a party has been allowed to discharge himself by other means than the ordinary vouchers; thus where the evidence in support of a charge, consists of entries in books kept by the party himself, the party has a right to make use of entries in the same book in support of his discharge (*q*); and so, if a paper is produced by one of the parties, from which he takes his charge, the same paper may be read by the other party by way of discharge (*r*): thus where an account furnished by a party before any suit instituted, is produced to charge him with the items on the debit side, he is entitled to resort to the credit side in support of his discharge (*s*).

Rule with respect to an-

This rule is adopted, in Equity, from analogy to the rule at Law, which provides—' that if, to prove a debt, it be sworn that the defendant confessed it, but withal said at the same time, that he paid it, his confession shall be valid as to the payment as well as that he owed it' (*t*), Upon this principle, it is held, that where a man, by his answer or examination, admits that he has received certain sums, which sums he had paid, &c., *the discharge following in the same sentence*, that will be sufficient to discharge him (*u*).

Discharge must be in same sentence as charge,

It is to be observed, that it is considered necessary in order to entitle the party charged by his own answer, to read such answer in support of his discharge, that the discharge should be by the same sentence with the charge. If it occurs in ano-

(*p*) Robinson v. Cumming, 2 Atk. 409-410. *Sed quære* whether an executor may not support his discharge by swearing to his belief that sums under forty shillings were paid by his testator himself.

(*q*) Darston v. Earl o Oxford, 1 Eq. Ca. Ab. 10, pl. 9.

(*r*) Carter v Lord Colrain, Barnardist. 126, acknowledged to be correct, 2 B. & B. 386.

(*s*) Boardman v. Jackson, 2 B. & B. 382.

(*t*) Trials *per pais*, vol. 2, 363.

(*u*) Ridgeway v. Darwin, 7 Ves. 404.

ther part of the answer, it cannot be made use of (*x*); and it has been held that a party charging himself in a schedule to his answer, cannot discharge himself by another schedule to the same answer, stating his disbursements (*y*); *a fortiori*, is he precluded from discharging himself, in this way, by affidavit (*z*). And it seems that it is not only necessary that the discharge should be by the same sentence with the charge, but it must form as it were one and the same transaction. In *Thompson* v. *Lambe* (*a*), Lord Eldon said, 'I am clearly of opinion that a person, charged by his answer, cannot, by his answer, discharge himself; nor even by his examination, unless it is in this way: if the answer or examination states that, upon a particular day, he received a sum of money and paid it over, that may discharge him; but if he says that upon a particular day he received a sum of money, and upon a subsequent day he paid it over, that cannot be used in his discharge; for it is a different transaction.' Upon the same principle it has been held, that a party charged with one sum of money, cannot discharge himself by distinct independent items on the other side of the account (*b*).

Discharge.

—and form part of the same transaction.

It seems also, that, where the account is of long standing, the Court will sometimes permit the accounting party to discharge himself, upon oath, of all such matters as he cannot prove by vouchers, by reason of their loss: this was done in *Peyton* v. *Green* (*c*), where, in regard that the account in question was of twenty years standing, it was ordered that the defendant should prove his account by his own oath, for what he could not prove by books or cancelled bonds; and, in *Holstcomb* v. *Rivers* (*d*), a similar direction was given, where the account was of fourteen years standing only.

Where account is of long standing, and vouchers lost.

It appears, also, that if executors or trustees have been led to divest themselves of the fund, by paying it over to their co-trustees or co-executors, the Court will, on a proper case,

Where one executor has paid over to another.

(*x*) Robinson v. Scotney, 19 Ves. 582.

(*y*) Boardman v. Jackson, 2 B. & B. 382.

(*z*) Ridgeway v. Darwin, 7 Ves. 404.

(*a*) 7 Ves. 588.

(*b*) Robinson v. Scotney, ubi supra.

(*c*) 1 Cha. Rep. 146; 1 Eq. Ca. Ab. 11. S. C.

(*d*) 1 Cha. Ca. 127.

Discharge.

permit the executor or trustee so paying it over, to discharge himself by his own oath, and that it will do this in preference to permitting one co-executor or trustee to exhibit interrogatories for the examination of the others (*e*).

Party cannot be discharged on his own oath without order.

But although, in the instances above stated, and in many others, the Court has declared upon the hearing of the cause, that in the circumstances under which the Bill has been filed it would apply a different rule of proof from that which is ordinarily applied; it is only when such declaration forms part of the order of the Court directing the account, or upon an order made under special circumstances, that the Master will be authorized to allow a party to discharge himself by his own oath, from the sums proved to have come to his hands (*f*).

Where party has *bonâ fide* dealt with property as his own.

It may be noticed with reference to this part of the subject, that there are many cases in which the Court decreeing an account, directs it to be taken with the admission of certain doments or testimonies not having the character of legal evidence; thus if parties have been permitted, for a long series of years, to deal with property as their own, considering themselves under no obligation to keep accounts as if there was any adverse interest, having no reason to believe the property belonged to another: though it would not follow, that, being unable to give an accurate account, they should keep the property, yet the account would be directed, not according to strict course, but in such a manner as, under all the circumstances, would be fit (*g*). It is to be observed, however, that it is not for the Master to decide, in such cases, as to the propriety of departing from the ordinary course of proceeding;— he cannot do so without the order of the Court, and that an order of the Court to this effect, will not always be made, until the difficulty of proceeding in the usual mode has become apparent upon an attempt to pursue it in the Master's Office; thus, in *Lupton* v. *White* (*h*), the Court refused to make such an order prospectively, but gave liberty to either

Order must be obtained to authorize Master to dispense with the usual proofs.

In what cases granted.

(*e*) Dines v. Scott, 1 T. & R. 358.

(*f*) Ibid.

(*g*) Vide Lupton v. White, 15 Ves. 433-443.

(*h*) Ubi supra.

party, if the Master in taking the account should find difficulty as to receiving any evidence, to apply to the Court for directions upon that particular point.

Just Allowances.

It may be mentioned here, that the Court will not allow anything to be placed to account, under the name of general expenses, but that the party must name the particulars (*g*). So, also, where a party discharges himself, upon his oath, of sums under 40*s*., he must, in his affidavit, mention unto whom paid and for what and when (*h*).

No allowance in respect of general expenses, unless items specified.

In almost every decree directing accounts to be taken by the Master, there is inserted a declaration that 'the Master is to make unto the parties all just allowance' (*i*). Under this direction, the Master is authorized to allow the parties such disbursements as may appear to have been fairly and properly made by them. It is to be observed, that it is not the ordinary course for the Court, in matters of this nature, to say in the first instance, what is a just allowance; but that it generally leaves the determination as to what is to be considered a just allowance to the Master, and that the Court is not called upon to decide it, except upon exceptions to the report (*k*). In *Cook* v. *Collingridge* (*l*), however, Lord Eldon, under the special circumstances of the case, made it part of the order that, as to such part of the allowance as should be claimed and objected to before the Master, he was to state his reasons for allowing or disallowing the same (*m*).

Just allowances, not determined upon by the Court in the first instance.

With respect to what, by the practice of the Court, may be considered as just allowances, that must depend very much upon the circumstances of each case; it is, however, a settled rule that whatever a trustee or personal representative has expended in the fair execution of his trust, may be allowed him in passing his accounts; thus where the decree, in a suit by residuary legatees, directed an account to be taken of the personal estate of a testator, *and of his debts and funeral expenses*, and the personal estate was ordered to be applied in payment of the debts and

What are.

Expenses paid by trustee or executor.

Legacies.

(*g*) Anon. 1 Eq. Ca. Ab. 11.
(*h*) Anon. 1 Vern. 283.
(*i*) Seton on Dec. 42.

(*k*) Brown v. De Tastet, Jac. 284—294.
(*l*) Jac. 607.
(*m*) Ibid. 625.

Just Allowances.

funeral expenses in a course of administration, and the Master allowed payments in discharge of legacies, it was held, that the payment of legacies, in such an account, was the subject of a just allowance, as the plaintiff could be entitled to nothing until the legacies were paid (*n*). So where a trustee, in the fair execution of his trust, has expended money by reasonably and properly taking opinions and procuring directions necessary to the due execution of his trust, he is entitled not only to his costs, but to his charges and expenses, under the head of *just allowances* (*o*). So, also, is the next friend of an infant; for as the infant himself cannot incur charges and expenses, if they cannot be claimed as just allowances, and the next friend is to be at the whole expense of the infant beyond his costs, persons will deliberate before they accept the office (*p*).

Costs of cases for the opinion of Counsel, &c.

Charges and expenses of next friend of infant.

The expenses of a sale may also be allowed, under the head of just allowance (*q*); and a widow who was trustee for her son, of the real estate, whereof she was dowable, was allowed, in accounting for the rents and profits, to retain so much thereof as she was entitled to for her dower, under the head of just allowances (*r*).

Expenses of a sale.

Wife's dower.

But although an executor or trustee is of course entitled, under the head of just allowances, to have all the reasonable expenses he may have incurred in the conduct of the trust, he is not entitled to any compensation for personal trouble and loss of time (*s*). This rule applies especially where an executor has an express legacy for his pains; nor will it alter the case, that the executor has renounced and yet is assisting to the executorship, even though it appears that he has deserved something, and benefited the trust to the prejudice of his own affairs (*t*). And, even where an executor had acted as a commission-agent for a testator, in his lifetime, under a power of attorney, and

Trustees and executors not entitled to compensation for loss of time,

even where executor has acted as commission-agent for testator.

(*n*) Nightingale v. Lawson, 1 Cox. 23.

(*o*) Fearns v. Young, 10 Ves. 184.

(*p*) Ibid.

(*q*) Crump v. Baker, 18 Ves. 285.

(*r*) Graham v. Graham, 1 Ves. 262.

(*s*) Robinson v. Pett, 3 P. Wms. 249; Scattergood v. Harrison, Mos. 128; Brocksopp v. Barnes, 5 Mad. 90.

(*t*) Robinson v. Pett, ubi supra.

was held entitled on an account to the usual commission on his agency, prior to the death of the testator, he was not allowed to charge commission on the business transacted subsequently to his death (*u*). The same rule has been extended to Solicitors and Attornies, who, in the character of executors and trustees, are not allowed any professional charge, or remuneration for loss of time or other emoluments, but only such charges and expenses, actually paid by them out of pocket, as the Master may find to have been properly incurred and paid (*x*).

Just allowance.

Solicitors and Attorneys of trustees allowed professional charges.

But although an executor or trustee, who acts himself as Solicitor in the affairs of his trust, cannot be allowed any thing for his professional assistance beyond what he has actually paid out of pocket, an executor or trustee who requires the assistance of a Solicitor, in the execution of his trust, will be allowed the amount of what he has *properly* paid to such Solicitor, in respect of his bill of costs;—he will not, however, be allowed, without question, whatever sum he thinks proper to pay to his Solicitor, but the practice in cases of this description is, for the Master to hand the Solicitor's Bill over to the proper officer to be taxed and moderated—without proceeding to a regular taxation (*y*).

But trustee will be allowed expense of employing another Solicitor;

—but his bills must be moderated.

The Court also holds, that where it is necessary to the due execution of their office, that trustees, &c., should employ accountants (*yy*), agents, or receivers, under them, they will be entitled to be allowed the costs of such agents or receivers; and thus, where a testator died possessed of several houses let at weekly rents, the Court held the trustees justified in paying a person to collect such rents, even though the testator had, by his will, given his trustees small annuities for their trouble (*z*).

Trustees also allowed expenses of agents and receivers where necessary.

(*u*) Sheriff v. Axe, 4 Russ. 33.

(*x*) Moore v. Frowd, 3 M & C. 45; vide etiam New v. Jones, 9 Bythewood's Convey. by Jarman, p. 338.

(*y*) Johnson v. Telford, 3 Russ. 477.

(*yy*) Henderson v. M'Iver, 3 Mad. 275.

(*z*) Wilkinson v. Wilkinson, 2 S. & S. 237, sed vide Weiss v. Dill, 3 M. & K. 26, where it was held that an executor will not be allowed to charge for an agent, except under very special circumstances, and that a Master's report, reducing the executor's charge, for the employment of such agent, from 5 per cent. to 2½ per cent., was correct.

Just allowance.

Executors in India allowed agency.

It is to be observed that agency will only be allowed where another party has been employed by the executor, and that an executor will not be allowed to charge for his own agency, even though he had acted as agent for the testator in his lifetime (z). The rule, however, is different with regard to executors in the East Indies; there, it seems, a different rule prevails:—according to the course of the Courts in India, and the usage there, an executor is entitled to a commission of five per cent for collecting the estate of the testator; the Court here, therefore, will make the same allowance to an Indian executor passing his accounts in this country (a); and, it seems, the executor will be entitled to such commission, although he has a legacy given him by the will, provided it is not expressly given to him in the character of executor (b), and that he will be allowed to charge it on all the assets of the testator collected by him in India; including the assets which he retains in respect of his own legacy, and the monies belonging to the testator which were in the hands of a commercial house in which the executor was, and the testator had been a partner (c).

Although legacy given him by will.

Where specific claims made by answer and not noticed in decree, it will not be allowed as a just allowance.

It may be noticed here, that where a substantive claim, for a specific allowance, (as for commission upon receipts in India,) has been made by the answer, and no special direction has been founded upon it in the decree, the Master will not be justified in making such an allowance under the head of 'just allowances' (d); the proper inference to be drawn from the fact of the claim, made by the answer, not being noticed in the decree, being either that the Court did not think it proper to be allowed, or that the party making it had abandoned it.

Of making rests.

The Master, in taking an account, does not, in general, strike any balance till the whole charge and discharge have been gone through, and he is not at liberty to make rests in the account, unless directed so to do by the decree (e). It frequently happens,

(z) Sheriff v. Cox, 4 Russ. 53.

(a) Chetham v. Lord Audley, 4 Ves. 72; Poole v. Larkins, ib.; Cockerell v. Barber, 1 Sim. 23.

(b) Cockerell v. Barber, ubi supra.

(c) Ibid.

(d) E. I. Company v. Keighly, 4 Mad. 38.

(e) Webber v. Hunt. 1 Mad. 13.

Rests.

however, that, upon further directions, he is ordered to make yearly, or half-yearly, or other rests; the object of which direction is, to enable the Court to see what balances he has, from time to time, retained in his hands, in order that it may judge whether he ought to be charged with interest on his balances or not (*f*). Where, therefore, such a direction occurs in a decree, the course for the Master to pursue is, to strike a balance at each rest, which the decree requires him to make, by deducting the amount of the discharge from the amount of the charge up to that period (*g*).

Direction not to disturb settled accounts.

It sometimes happens that, in decrees directing accounts, the Court orders the Master, if he shall find that there are stated accounts, not to disturb the same; this direction is usually inserted where a settled account is insisted upon in the answer and proved (*h*); where a settled account is insisted upon by the answer, but not proved, the order, not to disturb the accounts, will be accompanied by a direction that the plaintiff shall have liberty to surcharge and falsify (*i*). A settled account must, in such cases, be established before the Master, in the same manner as before the Court. The method of proceeding, where liberty is given to surcharge and falsify an account, has been before pointed out (*k*).

Surcharging and falsifying.

Computation of Interest.

Computation of Interest.

A direction to the Master to compute interest upon debts, legacies, &c., frequently forms part of the decree. In ordinary suits for the administration of assets, the direction is, that the Master shall compute interest on such of the testator's [or intestate's,] debts as carry interest, after the rate the same respectively carry interest (*l*), and upon his legacies, from the

(*f*) Hall v. Hallett, 1 Cox. 138, Raphael v. Bochar, 11 Ves. 110.

(*g*) As to computing interest with rests, vide post. 898.

(*h*) Cole v. Cole, cited 14 Ves. 579.

(*i*) Kinsman v. Barker, ibid.

(*k*) Ante, p. 190.

(*l*) Seton on Decrees, 51.

Computation of time and interest.

the rate directed by the testator's will; and where no time of payment or rate of interest is thereby directed, then after the rate of four per cent. per annum, which is the ordinary rate of interest given by the Court upon legacies and portions, where no specific rate of interest is directed by the will (*m*), from the end of one year after the testator's death (*n*).

On debts by specialty.

With respect to interest on specialty debts, no question can arise as to its computation,—the rate at which it is to be allowed upon such debts, generally appearing upon the deed or instrument by which the debt is created.

—when secured by a penalty.

It is to be noticed, however, that, with respect to a debt due on bond, the rule is to calculate interest up to the amount of the penalty of the bond (*o*); the Master cannot go beyond the amount of the penalty (*p*), unless the creditor claims upon two securities for the same sum, one of which is a bond with a penalty, and the other a mortgage; in which case the Master may calculate interest beyond the penalty of the bond. It appears also not to be important, in such a case, which instrument was executed first, the bond or the mortgage (*q*), nor that the party charged executed as a surety only (*r*).

In what cases Master may go beyond the penalty

The rule which limits the computation of the amount due upon a bond to the amount of the penalty, has been held to extend to a bond for securing the payment of an annuity, at least till the decision of Sir L. Shadwell, V. C., in *Jeudwine* v. *Agate* (*s*); this was generally supposed to have been the result of the decision of Lord Loughborough, in *Mackworth* v. *Thomas* (*t*), but in *Jeudwine* v. *Agate*, the Vice-Chancellor held that, in point of fact, there was no such decision in *Mackworth* v. *Thomas*, and the opinion expressed by his Honor, after looking into the cases was—' that whenever there is a distinct agreement that a thing shall be done, whether it be the conveyance of an

(*m*) Guillam v. Holland, 2 Atk. 343, Wood v. Briant, ib. 522.
(*n*) Seton on Decrees, 63.
(*o*) Sharp v. Earl of Scarborough, 3 Ves. 557.
(*p*) Tew v. E. of Winterton, 3 Bro. C. C. 489; 1 Ves. J. 451, S. C., Knight v. Maclean, 3 Bro. C. C. 496; Clarke v. Seton, 6 Ves. 411; Hughes v. Wynne, 1 M. & K. 20.
(*q*) Clarke v. Lord Abingdon, 17 Ves. 106.
(*r*) Ibid.
(*s*) 3 Sim. 129.
(*t*) 5 Ves. 329.

estate, the relinquishment of a right, *the payment* of an annual sum, or the payment of a sum of indefinite amount, (as in the case of *Weinholt* v. *Logan*(u),) there, notwithstanding the agreement appears in the form of a bond with a penalty, the Court will consider that the recital in the condition of the bond is evidence of the agreement, and will not limit the relief it gives to the amount of the penalty' (x).

Computation of Interest.

It is to be observed, however, that although his Honor is represented to have stated, that there was no such decision in *Mackworth* v. *Thomas*, as that contended for in *Jeudwine* v. *Agate*, he appears to have meant simply, that the facts in that case were not the same as those in *Jeudwine* v. *Agate*; and he takes a distinction between right to retain the arrears of an annuity claimed by an executor, in a suit for the administration of assets instituted by a creditor, (which was the case in *Mackworth* v. *Thomas*), and a substantive right asserted by the executor himself, in a Bill filed to enforce his right to relief out of the assets, (which was the case in *Jeudwine* v. *Agate*); so that, in fact, notwithstanding the decision of his Honor in the latter case, the rule laid down, in *Mackworth* v. *Thomas*, may be considered as still the rule of the Court, in suits by creditors, for the administration of assets, where the claim to the arrears of the annuity is made on behalf of the personal representative against whom the Bill has been filed, though it is otherwise where a suit is instituted by the annuitant himself.

Upon judgment.

Whilst we are upon this subject, it is right to mention that, till recent enactments, it was held that in suits for the administration of assets no interest was to be computed upon a judgment, unless an action at law had been brought upon the judgment, to recover interest in the shape of damages (y); but in *Hyde* v. *Price*(z), Sir L. Shadwell, V. C., held, that the circumstance of the creditor having filed a Bill for the purpose of obtaining the benefit of his judgment in equity, (the situation of the assets being such as to render a Bill the proper remedy,) was equivalent to the commencement of an

(u) 1 Clk. & Fin. 611.
(x) 3 Sim. 140.
(y) Gaunt v. Taylor, 3 M. & K. 302.
(z) 8 Sim. 578.

Computation of Interest.

action at law. His Honor also held, that the case was put in a more favourable position, by the Act of the 3 & 4 W. 4, c. 42, s. 28, (by which it is enacted, 'that upon all debts or sums of money payable at a certain time, or otherwise, the jury, on the trial of any issue, &c., may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when such debts or sums were payable, if such debts or sums of money be payable by virtue of some written instrument, at a certain time; or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice, to the debtor, that interest will be claimed from the date of such demand until the time of payment,') which Statute being of a remedial nature, his Honor thought it would be absolutely necessary for the Court to adopt as to many of its provisions. All difficulty, however, as to allowing interest upon judgments, has been taken away by the Act 'for abolishing Imprisonment for Debt upon Mesne Process' (*a*), by which it is enacted, that every judgment debt shall carry interest, at the rate of four pounds *per centum, per annum*, from the time of entering up the judgment, or from the time of the commencement of the Act (in cases of judgments then entered up, and not carrying interest), until the same shall be satisfied.' So that now, no action at law, or suit in equity, is necessary to enable a Master to compute interest on a judgment debt, but interest must be computed by the Master upon every sum of money due upon judgment, or upon a decree or order in equity, &c. (*b*), at the rate of four per cent. from the entry of such judgment or decree, &c.

On arrears of annuities.

Formerly interest was allowed upon the arrears of an annuity, where they were secured by a bond with a penalty (*c*), or where the annuity was given for maintenance (*d*), or where it was left to a wife by her husband's will (*e*). It has also been

(*a*) 1 & 2 Vict. c. 110, s. 17.

(*b*) The next section, (18,) enacts, that decree and orders of Courts of equity shall have the same effect as judgments at law. Ante, p. 691.

(*c*) Newman v. Auling, 3 Atk. 579.

(*d*) Ibid.

(*e*) Litton v. Litton, 1 P. Wms. 543; vide etiam Drapers' Comp. v. Davis, 2 Atk. 211.

allowed, where there have been great arrears (*f*), or where there has been an obstinate delay of payment (*g*), or where the annuitant has been compelled, by the delay, to borrow money at interest (*h*). The allowance of interest on such arrears, was, however, always held to be discretionary in the Court; and, in later cases, it has been refused notwithstanding the existence of circumstances which before induced the Court to allow it (*i*). In *Robinson* v. *Cumming* (*k*), Lord Hardwicke said, there was no instance where the Court had ever allowed arrears upon such an annuity, (viz., an annuity secured by grant, by way of mortgage, with power of entry in case of arrears,) unless, indeed, the annuitant had entered and been in possession of the estate charged with the annuity, in which case the Court would not have obliged him to have quitted the possession, unless the grantor had agreed to allow him interest for the arrears of his annuity, down to the day. This seems to be consistent with the rule laid down by Lord Talbot, in *The Countess of Ferrers* v. *Earl Ferrers* (*l*), viz., that 'arrears of an annuity or rent charge are never decreed to be paid with interest, but where the sum is certain and fixed; and also where there is either a claim of entry, or *nomine pœnæ*, or some penalty upon the grantor, which he must have undergone if the grantee had sued at law, and which would have obliged him to come into this Court for relief, which the Court will not grant but upon equal terms, and those can be no other than decreeing the grantor to pay the arrears with interest.'

Computation of Interest.

With respect to debts upon simple contract, and other debts which do not carry interest upon the face of them, equity, in giving interest, *sequitur legem*, and the Courts will allow interest to be computed in the administration of assets upon all debts upon which interest is given by Courts of Law (*m*). Formerly, the

On debts by simple contract.

(*f*) Batten v. Earnley, 2 P. Wms. 163.

(*g*) Stapleton v. Conway, 1 Ves. 428.

(*h*) Anon. 2 Ves. 661; Bignal v. Brereton, 1 Dick. 278.

(*i*) Vide Tew v. Earl of Winterton, 1 Ves. J. 451; 3 Bro C. C. 489. S. C.; Anderson v. Dwyer, 1 Sch. & Lef. 301

(*k*) 2 Atk. 411

(*l*) Ca. Temp. Talb. 2.

(*m*) Boddam v. Ryley, 1 Bro. C. C. 239; Parker v. Hutchinson, 3 Ves. 135; Upton v. Lord Ferrers, 5 Ves. 803; Lowndes v. Collens, 17 Ves. 29.

Computation of Interest.

rule appears to have been not to compute interest in equity, where it could only be given at law in the form of damages (*n*), although for a long time a distinction appears to have existed, and still exists, in favour of allowing interest to be computed upon promissory notes, and upon all other sums payable on demand, or on a day certain, upon which interest may, according to the practice of Courts of law, be calculated either from the time of the demand made, or from the fixed period of payment (*o*).

On stated accounts.

It is to be remarked, that, where there has been a stated account between the parties, the balance appearing due on such account, will carry interest (*p*); because, in such a case, it is held that there is an implied contract on the part of the debtor to pay, and all contracts to pay give a right to interest from the time when the principal ought to be paid (*q*). Such balance, however, must appear upon a regular statement of accounts, and, to constitute such a statement, there must be a settlement or acknowledgment by *the debtor*, raising the contract to pay as the ground upon which alone interest will be given (*r*).

Where there is a trust for payment of debts.

It may be mentioned here, as a general rule, that a charge of debts on real estate does not entitle simple contract creditors to interest (*s*). In *Barwell* v. *Parker*, Lord Hardwicke is reported to have said, that if a man, in his life, creates a trust for the payment of debts, annexes a schedule of some debts, and

(*n*) Rigby v. Macnamara, 2 Cox. 420; Bell v. Free, 1 Swanst. 91.

(*o*) Lowndes v. Collens, 17 Ves. 27; Upton v. Lord Ferrers, 5 Ves. 803; Parker v. Hutchinson ubi supra. The Statute 3 & 4 W. 4, c. 42, s. 28, before referred to, (ante, p. 894,) by authorising juries to compute interest upon such debts, or sums of money as are therein mentioned, instead of giving it in the form of damages for withholding payment, has done away with many of the distinctions formerly existing upon this point.

(*p*) Barwell v. Parker, 2 Ves. 363; Vernon v. Cholmondeley, Bunb. 119; vide 2 Eq. Ca. Ab. 532, pl. 17, 20; Blaney v. Hendricks, 2 Blackst. Rep. 761; 3 Wils. 205. S. C.

(*q*) Boddam v. Riley, 2 Bro. C. C. 2; 4 Bro. P. C. 561, 8vo. ed.; sed vide Exp. Furneaux, 2 Cox. 219; and Exp. Champion, 3 Bro. C. C. 436.

(*r*) Ibid.

(*s*) Barwell v. Parker, 2 Ves. 363; Earl of Bath v. Earl of Bradford, ib. 588; Lloyd v. Williams, 2 Atk. 109; Hamilton v. Houghton, 2 Bli. 186; Shirley v. Earl Ferrers, cited ib.; vide contra, Maxwell v. Wettenhall, 2 P. Wms. 26.

creates a trust term for the payment, as that is in the nature of a specialty, that will make them, though simple contract debts, carry interest (*t*).

Computation of Interest.

It seems, however, that, in order to effect this, the deed must have been executed by the simple contract creditors, and that they must have given up their right to sue the debtor upon his debt, otherwise there would be nothing to shew that they had contracted for a specialty, by taking a security upon the land, and discharging the person of their debtor (*u*).

Of another person.

It may be mentioned here, that, in *Shirt* v. *Westby* (*x*), a charge, by will, on real estate of the simple contract debts of another person, was considered as a legacy, and interest was ordered to be computed on such debts at the rate of four per cent.

Rate at which computed.

With respect to the rate at which interest is to be computed, the usual rate of interest allowed in this Court, upon legacies and portions, is, as has been stated (*y*), four per cent., and the same rate of interest is given by the 1 & 2 Vict. c. 110, s. 17, upon judgments and monies ordered to be paid by the decrees or orders of this Court, &c. In *Upton* v. *Lord Ferrers* (*z*), interest on a promissory note was ordered to be computed at five per cent. In *Parker* v. *Hutchinson* (*a*), interest, on a similar security, was computed at four per cent.

Interest computed to date of report.

In calculating interest, under a decree, the Master usually calculates it up to the date of his report; but it generally forms part of the decree upon further directions, that the Master shall compute subsequent interest on the debts mentioned in his report, on which he has computed interest (*b*).

Subsequent Interest.

It is to be observed, that the Court never directs interest to be computed on debts not previously carrying interest (*c*), and that in computing subsequent interest on the debts which carry interest, although it was formerly held that interest, when computed by the Master, became principal, and would carry

(*t*) Barwell v. Parker, ubi supra; Stewart v. Noble, Vern. and Scriv. 528, 537.

(*u*) Hamilton v. Houghton, 2 Bli. 186.

(*x*) 16 Ves. 393.

(*y*) Ante, p. 892.

(*z*) 5 Ves. 803.

(*a*) 3 Ves. 135.

(*b*) Seton on Dec. 58.

(*c*) Creuze v. Hunter, 2 Ves. jun. 165; 4 Bro. C. C. 316, S. C.

Subsequent Interest.

interest(*c*); the rule now is, not to compute interest upon interest reported to be due, even in the case of a mortgage, though the practice formerly was, to consider the interest as principal, from the date of the Master's report(*e*), the ground of which practice was, that the party came for the favour of the Court;—he was ordered to pay a given sum on a certain day, and if he did not, he was put under terms of paying what would indemnify the other party completely (*f*).

Computation, with rests.

When the Master is ordered to compute interest with rests, the object of the Court is to charge the accounting party with compound interest. It appears, however, that formerly a difference of practice prevailed amongst the Masters upon this point, and that some of them, at the time of the rests, carried the interest to a separate column, and computed subsequent interest on the principal only, and thus charged the party with simple interest only; the proper course, however, is, to add the interest to the principal, at the time of the rest, and to compute interest upon the aggregate sum (*g*).

Settlement of Deeds, &c.

Settlement of conveyances and other deeds

Amongst the ministerial acts which the Master is most frequently called upon to perform, may be enumerated the settlement of conveyances or other deeds, the appointment of trustees, and the superintendence of sales ordered to take place before him; to which may be added, the appointment of receivers, and of guardians of infants, and of the allowances for their maintenance, &c.; but which, as being more generally directed upon interlocutory applications, will be reserved for future consideration.

Where parties differ.

When a conveyance, or other deed, is ordered to be executed, it usually forms part of the order directing it, that

(*c*) Vide Bacon v. Clerk, 1 P. Wms. 480.

(*d*) Whatton v. Cradock, 1 Keen, 26; and vide ante, 541.

(*e*) Turner v. Turner, 1 J. & W. 47; Perkyns v. Baynton, 1 Bro. C. C. 574, and vide Brown v. Barkham, 1 P. Wms. 653; Butler v. Duncomb, 1 P. Wms. 453; Astley v. Powis, 1 Ves 496; and Creuze v. Hunter, ubi supra.

(*f*) Turner v. Turner, ubi supra.

(*g*) Raphael v. Boehm, 11 Ves. 97, 103.

it shall be settled by the Master, in case the parties differ about the same.

Where Parties differ.

Within what time objections must be delivered.

The course of proceeding under such a direction is pointed out by the 76th of Lord Lyndhurt's Orders (*h*), which provides that where a Master is directed to settle a conveyance, in case the parties differ about the same, then the party entitled to prepare the conveyance shall bring the draft of the conveyance into the Master's Office, and give notice of his having so done to the other party. This notice may be given by serving the usual warrant 'on leaving' (*i*); after which the other party is at liberty, within eight days, to inspect the same without fee, and to take a copy thereof, if he thinks proper.

Application for further time.

If the party is not prepared, or likely to be prepared, at the end of the eight days, to adopt the conveyance, or to state his objections to it, he should apply to the Master for further time, which the Master is, by the above Order, empowered to grant at his discretion.

Statement of objections.

If he does not obtain an extension of time, he must, at or before the expiration of the eight days, (or having obtained such extension, at or before the expiration of such further time as the Master in his discretion shall allow,) either adopt the conveyance or signify his dissent therefrom, which he must do by delivering a statement, in writing, of the alterations which he proposes to make in the draft of the conveyance, serving, at the same time, a warrant 'on leaving.'

Settlement of draft.

If the party does not signify his dissent, or deliver a statement, in writing, of his proposed alterations, within the eight days, or such further time as the Master may have appointed for that purpose, the Master, at the expiration of the eight days, or the further time which he has appointed, may proceed to settle the conveyance according to the practice of the Court, which he must also do where a statement of proposed alterations has been delivered, and the party bringing in the draft refuses to accede to them.

(*h*) Ord. 1828, as amended 1831.

(*i*) Ante, p. 798.

Settlement of Deeds.

Costs.

It is to be observed, that, by the 76th Order (*l*) it is directed, that, in case the Master shall adopt the proposed alterations in the draft of the conveyance, then the costs of the proceeding in respect of the conveyance shall be borne by the other party.

Draft may be laid before Conveyancer.

The rule as to settling conveyances, under the decree of this Court, is thus stated by Lord Hardwicke—'Where conveyances are to be made by a decree of this Court, the settling them, to be sure, is to be, by the like kind of rule, as men of judgment among the Conveyancers would direct' (*m*). This being the rule, the Court sanctions the practice, generally resorted to by the Masters, before settling a conveyance, of directing the draft to be laid before a Conveyancer to advise upon it (*n*), in which case the same course of proceeding must be adopted as when he directs an abstract to be laid before a Conveyancer (*o*).

Allowance of deed.

Certificate.

When the Master has settled the draft of the conveyance, an engrossment of it will be made in the Master's Office, and the Master will signify his allowance of it by signing his name in the first and last skins, and also his allocation in the last skin, in the following form, in the margin of the engrossment.—'*A.* v. *B.* *I approve of and allow this indenture, being the same mentioned in my report, dated the — day of —.*' He then signs a report or certificate of his having approved and allowed the engrossment, which must be filed in the usual manner (*p*). But no warrants on preparing, or to sign certificate, are taken out, nor is any order necessary to confirm it (*q*).

Execution of deed.

The conveyance, having been approved of by the Master, must be executed by the parties, and, if anything is required to be done by the Court, or by the Accountant-General, on the execution of the conveyance, an affidavit of such execution must be made, and on such affidavit the Master will issue his certificate, which is filed in the usual manner (*r*).

(*l*) Ord. 1828, as amended 1831.

(*m*) Loyd v. Griffith, 3 Atk. 264.

(*n*) Turn. & V. 421, vide 3 Atk. 266.

(*o*) Ante, p. 872.

(*p*) 1 Turn. & V. 422.

(*q*) Ibid.

(*r*) 2 Smith, 105.

Exceptions lie to the Master's certificate of having settled a conveyance (*s*), and in *Lloyd* v. *Griffith* (*t*), the Court directed the Master forthwith to make his certificate or report of his approbation of the draft of a conveyance, which he was to settle, in order that the party might except thereto.

Exceptions to Report.

Appointment of New Trustees.

When it is referred to the Master to appoint new trustees, in the room of trustees who are dead or decline to act, &c., the course to be pursued is, for the party obtaining the reference to leave, in the Master's Office, a state of facts and proposal, stating the nature of the property, the interest of the parties, &c., and proposing the parties who are to be the new trustees. In support of this state of facts, an affidavit of the eligibility of the new trustees is necessary; and it seems that sometimes the Master requires the production of the acceptance, in writing, of the trust by the new trustees (*u*). Warrants on leaving, and to proceed, &c., having been served, if the proposal is satisfactory, the Master prepares and signs his report appointing the new trustees. This report is filed, and may be excepted to in the same manner as other reports of a similar nature, but, upon hearing the exceptions, the Court will not enter into the comparative merits of the several persons who have been proposed by the different parties (*x*). It frequently happens that the order directing the appointment of new trustees, directs a conveyance of the trust estates to such new trustees, to be executed, and orders the Master to settle such conveyance. When this is the case, after the Master has made his report of the appointment of the new trustees, the proper conveyances for vesting the estate in such new trustees are prepared, and brought into the Master's Office, and proceeded upon, in the same manner as other deeds (*y*).

Appointment of new Trustees.

State of facts.

Acceptance by new trustees.

Report.

Conveyance of trust property.

It may be mentioned, with reference to this subject, that in

No power of new appointment where none existed before.

(*s*) Wakeman v. Duchess of Rutland, 3 Ves. 504; Loyd v. Griffith, 3 Atk. 264.

(*t*) 1 Dick. 103; and Huggins v. York Buildings Comp. cited ibid.

(*u*) 2 Smith, 325.

(*x*) Attorney-General v. Dyson, 2 S. & S. 528.

(*y*) Ante, p. 898.

Sales of Property.

the conveyance to new trustees, the Court will not insert a clause to enable the new trustees to appoint others in their stead, unless there is a provision to that effect in the original instrument by which the trust is created (*z*), and that when the original deed does contain such a clause, the Court will not, on the application of the trustees themselves, appoint new trustees, without a reference to the Master (*a*); the rule of the Court being, that when persons are authorised to choose, if they will not exercise the power without coming to the Court, there must be a reference (*b*).

Sales of Property.

Sales of Property.

Where an estate, or other property, is directed to be sold to the best bidder, with the approbation of the Master, it must be sold by public auction, unless the Court specially directs that a different method of disposing of the property shall be adopted, which it will sometimes do, under circumstances which will be hereafter pointed out (*bb*).

By whom conducted;

A sale under the direction of the Court is generally conducted by the Solicitor for the plaintiff, and he is, in all questions which may arise between the purchaser and the vendor, to be considered as the agent of all the parties to the suit (*c*).

—generally at Master's Office and by his Clerk;

In strictness, all sales ought to take place in the Public Room at the Master's Office in London, and should be effected by the Master's Clerk; and formerly, if it was considered for the benefit of the parties interested that the estate should be sold in the country, or by any other person than the Master's Clerk, it was necessary to have a special order of the Court, to warrant such a deviation from the ordinary practice (*d*); but the necessity for such an order has been taken away by Lord Lyndhurst's Orders (*e*), which directs, that where estates or other property are directed to be sold before

—but Master may direct it to take place in the country,

(*z*) Bayley v. Mansell, 4 Mad. 226.

(*a*) —— v. Robarts, 1 J. & W. 251.

(*b*) Ib.; vide Webb v. Lord Shaftesbury, 7 Ves. 480.

(*bb*) The personal effects of a person deceased are generally ordered to be sold by the representatives, under the direction of the Master.

(*c*) Dalby v. Pullen, 1 R. & M. 296.

(*d*) Turner & V. 401.

(*e*) Ord. 1828, LXXV.

the Master, the Master shall be at liberty, if he shall think it for the benefit of the parties interested, to order the same to be sold in the country, at such place, and by such person, as he shall think fit.

In the Country. —and by an auctioneer.

Under this order, a party desirous that the property should be sold in the country, or by an auctioneer, instead of the Master's Clerk, should prepare and leave a proposal to that effect, and if, upon attending the warrant 'to proceed,' the Master is of opinion that the proposal should be adopted, he makes a report to that effect, which is filed in the usual manner, and does not require confirmation (*f*).

Course of proceeding to obtain a sale in the country.

It is to be observed, that the auctioneer, or person appointed to sell, is not allowed a *per centage* upon the purchase money, but it is usual for the vendor's Solicitor to make an arrangement with him, to sell the property for a fixed sum, the amount of which it is prudent to submit to the Master, on attending the warrant upon the proposal, so that no question may arise, on the taxation of costs, as to the propriety of the payment (*g*). It may be useful here to remark, that a proposal to appoint a London auctioneer or surveyor, to sell an estate in the country, would be rejected, and that an Attorney or Solicitor is disqualified (*h*).

Auctioneer not allowed per centage.

London auctioneer never appointed, nor a Solicitor.

If the auctioneer, or other person appointed to sell, is to be authorised to receive deposits, or any other money, in respect of the property, he should give security, to be approved by the Master, duly to account.

In what cases security will be allowed.

Where it is desirable to have a reserved bidding appointed by the Master, for the purpose of preventing an estate from being sold at an under value, the proper course is to apply to the Court, by motion, for such a direction (*i*), when an order will be made for the Master to fix a reserved bidding, if he should think fit (*k*). The form of the order is usually the same as that in *Jervoise* v. *Clarke* (*l*), and in acting upon it a correct

Reserved bidding,

—must be applied for by motion.

(*f*) 2 Smith, 177.

(*g*) Ibid.

(*h*) 1 Turn. & V. 403.

(*i*) Such a direction ought not to be inserted in a decree for a sale, but ought to be the subject of a separate order. Per Sir J. Leach, M. R., in Brooker v. Collier, 3 Russ. 369.

(*k*) Shaw v. Simpson, cited 1 Jac. & W. 392.

(*l*) Ibid. 389.

Reserved Bidding.

Course of proceeding upon order.

valuation of the estate should be made by a skilful surveyor, setting out, in schedules, the amount of the rental, and the estimated value of the whole estate, and of each lot separately, and the sum at which the same ought to be sold together, and also at what stated sum each lot ought to be sold. A state of facts, comprising, shortly, the valuation of the estate, and an affidavit of the surveyor, in support of the valuation, must be brought in to the Master's Office, whereupon the usual warrants 'on leaving,' and 'to proceed,' must be served and attended. The Master then draws a conclusion from the evidence, before him, and fixes a bidding, as directed by the order, which he commits to writing, and encloses under a sealed cover, and delivers to the person appointed to sell the estate, for the purposes mentioned in the order, but he makes no report or certificate of the proceeding (*m*)

Particulars of sale.

Where an estate is directed to be sold before a Master, the particulars and conditions of the sale are prepared by the Solicitor of the plaintiff (*n*), or other party having the conduct of the cause (*o*). They are intituled in the cause, and must contain a general description of the nature and situation of the property, in whose possession it is, or has lately been (*p*), and, as no auction duty is payable on sales under the Court of Chancery, it is considered advisable that the particulars should so describe it (*q*).

Conditions of sale.

The conditions of sale, which should be annexed to the particulars, are generally similar to those annexed to sales of estates by auction in the ordinary way (*r*). If a reserved bidding has been appointed by the Master, it should be mentioned in the conditions (*s*).

Advertisement.

After the particulars and conditions of sale have been prepared and allowed by the Master, the first advertisement for the sale must be prepared either by the plantiff's Solicitor or by the Master's Clerk (*t*), and the signature of the Master must

(*m*) 1 Turn. & V. 404.

(*n*) 2 Harr. Ed. Newl. 490.

(*o*) For information as to the form, &c., of these particulars, vide 1 Sugden V. & P. 30, et seq.

(*p*) 2 Smith, 173.

(*q*) Ibid.

(*r*) Vide 1 Sug. V. & P. 30.

(*s*) 2 Smith, 177.

(*t*) This is sometimes done, for the purpose of saving time, before the particulars are settled.

be obtained to authorize the insertion of the advertisement in the Gazette (u). The advertisement should also be inserted in other newspapers in London, and, if the sale is in the country, in the provincial papers published near the place where the property lies.

Advertisements.

There are always two advertisements: in the first, no time is appointed for the sale. About three weeks or a month after the insertion of the first advertisement, a warrant must be taken out to fix a time for the sale, which must be served on the Clerks in Court of all the parties. The warrant being attended, the Master, with the approbation of all parties, will fix the time; and the second advertisement, which is usually called the *peremptory advertisement*, stating the time, must then be prepared, and inserted in the Gazette and other newspapers (x).

Time for sale, how fixed.

Second, or peremptory advertisement.

By a general order of the Court, dated the 24th of March, 1814 (y), it is ordered, that the Solicitor for the party prosecuting any decree or order of the Court for a sale, shall be at liberty, in cases in which the Master shall think fit, to print and disperse as many particulars as shall be thought beneficial, under the direction of the Master, in whose office such sale shall be, paying sixpence per side for so many printed copies as there shall have been actual bidders at the sale, and no more, and that such payments shall be allowed the Solicitor upon the taxation of his costs (z).

Distribution of printed particulars.

(u) 1 Sugd. V. & P. 55; 2 Har. Ed. Newl. 490; vide ante, p. 856.

(x) 1 Turn. & V. 404; 1 Sugd. V. & P. 56.

(y) Beames's Ord. 483; 2 V. & B. 417.

(z) By the schedule to the orders issued on the 21st of December, 1833, pursuant to the 3 & 4 W. 4, c. 94, it is directed, that upon every sale by the Master, where the purchase money does not exceed 2,000*l*., payable upon the report confirmed absolute, by such party as the Master shall direct, there shall be paid a fee of 5*l*., and for every sale above 2,000*l*., 5s. more on every 100*l*. This was intended to cover all the expenses of the sale, and was held to mean that the fees, payable in each case, applied to the money produced by the whole sale, although the property was divided into a variety of lots, and sold to different purchasers, (in re Allen's Charities, 2 M. & K. 627); but, by a subsequent order of the 23rd of February, 1837, the fees appointed by the above schedule have been abolished, and a new schedule of fees substituted, by which, besides the usual fee of 1*l*. 1s. upon every advertisement, an additional fee of 3*l*., in addition to the reasonable travelling expenses of the Master's Clerk, has been appointed to be

In London.

Proceedings at sale in London.

The sale, when it takes place at the Public Office, in Southampton Buildings, should be attended by the Solicitor for the plaintiff, and is conducted in the following manner:—The Master's Clerk prepares a paper, on which the biddings for the different lots are to be marked (*a*). This generally consists of a copy of the particulars of sale, with spaces between each lot (*b*). The lots are successively put up, at a price offered by any person present, such person signing his name to the sum which he offers, on the above paper (*c*). Every subsequent bidder must also sign his name to the sum he offers (*d*), until no person will advance on the last bidder, who is then declared the purchaser, unless there has been a reserved bidding fixed by the Master, in which case, if the last bidding does not reach the reserved bidding, the Master's Clerk, or person selling, is to declare that the lot has not been sold, but has been bought in by the persons interested in the estate (*e*).

When reserved bidding has been fixed.

Party to the cause must have an order to warrant his bidding for himself.

It is to be observed that, although there can be no doubt, that a residuary legatee, or tenant for life, or the owner of a reversionary interest, may become a purchaser at a sale under the order of the Court (*f*), it is necessary, if he be a party to the record, that he should have a previous order to warrant his being admitted as a bidder at the sale; and the Court will not permit a party, having such an order, to conduct the sale (*ff*).

Best bidder to be declared the purchaser

The best bidder being declared, the purchaser, must, in addition to the signature of his name after his bidding, add his description and place of abode. If he buys as agent, he signs, A. B., agent for C. D., of ——, &c. (*g*).

Same proceedings on subsequent lots,

The same process is gone through with respect to all the other lots, and if any lots are not sold, they must be again advertised for sale (*gg*).

—where sale is in the country, and by auctioneer, &c.

If the sale takes place in the country, and any other person than the Master's Clerk is appointed to sell, the person so ap-

paid upon every peremptory advertisement for the sale of property, to be repaid if the property shall not be offered for sal .

(*a*) 1 Turn. & V. 404.

(*b*) 1 Sugd. V. & P. 56.

(*c*) 1 Turn. & V. 405.

(*d*) Ibid.

(*e*) 2 Smith, 178.

(*f*) Williams v. Attenborough, Turn. & R. 76.

(*ff*) Domville v. Barrington, 2 Y. & Coll. 724.

(*g*) 2 Smith, 182.

(*gg*) 1 Turn. and V. 405.

pointed must proceed in the same manner as the Master's Clerk; it is necessary, however, that he should verify the accuracy of the proceedings by affidavit. This affidavit is prepared by the Master's Clerk, and generally states that the deponent proceeded to sell the estate, according to the printed particulars and conditions of sale thereof, settled and allowed by the Master, and specifies where and when the sale took place; and that he has annexed a schedule, containing a full and true account of all and every sum and sums of money which was or were bid for the said lots respectively, and also the names of all and every the persons and person who attended at the said sale, and bid for the lots respectively, (this schedule is, generally, the original paper upon which the biddings taken at the sale were put down, and signed by the bidders;) and he further swears that the respective sums lastly set down as being the highest bidding for the said lots, were the highest and largest sums that were offered and bid for the same respectively at the said sale, and verifies the handwriting of the highest bidder to each lot, and that the whole of the the sale was conducted by him, the deponent, in a fair, open, and candid manner, &c. (*h*).

In the Country. Affidavit of auctioneer will be required.

It is not usual, in sales of estates under the decrees of the Court, to require the purchaser to make any deposit (*i*). It is, however, sometimes done: and it seems that, in cases where timber upon an estate is sold separately from the estate itself, the practice is to require a deposit; the conditions of a sale usually providing, that the purchaser of each lot shall sign an agreement for the performance of the conditions, and pay one third of the amount of the purchase money, (or a certain *per centage* upon its amount,) in cash or Bank of England notes, at the time of the sale, to the person appointed to sell (*k*). Where such a direction occurs, or where from any other circumstance the person employed to sell any property, not being the Master's Clerk, under the direction of the Master, is to receive money either in shape of deposit or otherwise, on account of the purchase money, he will be required to give security, or

Deposit not usual.

Secus where timber is sold separate from the estate.

(*h*) 2 Smith, 183.
(*i*) Ibid. 183 224.
(*k*) Ibid. 225.

Deposit.

enter into recognizances, to be approved by the Master, that he will duly pay the same into the Bank, in the name and with the privity of the Accountant-General.

Or materials of mansion house.

In a case mentioned by Mr. Smith (*l*), where the sale was of the materials of the old mansion house,—upon the Master's making a report approving the person to sell, an order appears to have been made that such person should be at liberty to receive the purchase money for the lots comprising the materials of the mansion, and that he should pay the same, from time to time, into the Bank, in the name and with the privity, &c., the amount of such payments to be verified by his affidavit.

Proceeding with regard to purchase money on sale of timber.

It may be mentioned here, that where timber is sold under the direction of the Court, the conditions of sale, besides providing that the purchaser of each lot shall sign an agreement for the performance of the conditions, and pay one third of the amount of the purchase money, in cash or Bank of England notes, at the sale, generally stipulates that he shall give to the person appointed to sell, bills drawn upon and accepted by some other person or persons, for the remainder of the purchase money, such bills to be approved of by the auctioneer, and made payable in London, at particular times in the conditions of sale expressed, and that no purchaser shall be permitted to enter or cut until such bills are given (*m*). These conditions, however, vary according to the custom of the particular part of the country in which the estate, where the timber is growing, is situated; and, in some cases, instead of the above condition, it is provided that the purchaser, after making a deposit of £10 per cent. upon the amount of his purchase money, shall, within a month, give security, to be approved by the Master, or enter into recognizances for the payment of the remainder (*n*).

Agreement for purchase usually signed.

If the conditions are framed in this manner, the highest bidder of each lot signs an agreement, at the foot of the particulars of sale, whereby he agrees to become the purchaser of the lot, subject to the conditions; he then pays the deposit, and gives a bond, or enters into recognizances for payment of the residue, such bond or recognizances having been

(*l*) Fournier v. Duchess of Kent, V. C. 19 July, 1827, 2 Smith, 220.

(*m*) 2 Smith, 224.

(*n*) Ibid. 227.

previously settled by the Master (*o*). With reference to this part of the subject, it may be stated, that where timber had been sold under such conditions as those above stated, the purchasers were discharged from that part of them which required them to enter into recognizances, on paying the remainder of the purchase money to the receiver in the cause, deducting a discount of five per cent. from the day of payment to the time when the purchase money was to be paid in (*p*).

Method of Completing.

In ordinary sales by auction, or by private agreement, the contract is complete when the agreement is signed; but a different rule prevails in sales before a Master; in such cases, the purchaser is not considered as entitled to the benefit of his contract till the Master's report of the purchaser's bidding is absolutely confirmed (*q*).

Contract not complete till report confirmed.

In order to obtain the benefit of his contract, therefore, the purchaser must first procure, at his own expense, a report from the Master of his being the best bidder for the lot he has purchased (*r*).

Method of completing contract —by purchaser.

After the report has been filed, and an office copy taken by the purchaser, he must, at his own expense, apply to the Court, by motion, that the purchase may be confirmed (*s*). This motion requires no previous notice (*t*), and the order made upon it will be that the purchase may be confirmed *nisi*, *i. e.*, unless cause is shewn against it within eight days after service of the order (*u*). The purchaser must, at his own expense, procure an office copy of this order from the Registrar, and he may serve it on the Clerks in Court for all the parties in the cause (*x*). If no cause is shewn within the eight days, the purchaser must, at his own expense, apply to the Court to confirm the order absolutely, which will be ordered of course on the production of an affidavit of the service of the order *nisi*, and a certificate of no cause having been shewn. This certificate must bear date on the day of the application (*y*), and is

Order to confirm report *nisi*.

Service of.

How made absolute.

(*o*) Vide Sitwell v. Sitwell, 4 Mad. 183.

(*p*) Ibid.

(*q*) 1 Sugd. V. & P. 58.

(*r*) Ibid. 59.

(*s*) It may also be done by petition of course at the Rolls. Ord. 1828, XXI. Each purchaser must obtain an order to confirm his own purchase. If he has purchased more than one lot, they must all be included in the same order, but two or more purchasers of one lot must join in the application; vide Darkin v. Marye, 1 Anst. 22.

(*t*) 1 Sugd. V. & P. 59.

(*u*) Ibid.

(*x*) Ord. 1828, XXI.

(*y*) 1 Turner & V. 405; and vide ante, p. 811 n. (*h*)

Method of Completing.

obtained from the Registrar by application to the entering Clerk and leaving the order *nisi* the day before (*y*). Notice of this application need not be given, and, in term time, it may be made on any day of the Court sitting. Out of term, it can only be made on a seal day, and if the eight days do not expire before the seal day arrives, the Court will not make a prospective order giving the party leave to move on a subsequent day (*z*). But if the purchaser be served with notice of a motion to open the biddings, he cannot proceed to confirm his report absolutely (*a*).

Not after notice of motion to open biddings.

May be made absolute by vendor,

It may be observed here, that if the purchaser, after he has obtained his order *nisi*, neglects to confirm it, the vendor may move to make it absolute without obtaining a new order *nisi* (*b*). If the purchaser has not obtained an order *nisi*, the vendor may move for and obtain one; and it seems that, by consent, the order to confirm the report may be made absolute in the first instance; but this practice is irregular, as it precludes the opportunity given by the eight days in the order *nisi* to open the biddings (*c*).

—or by consent without order *nisi*.

Bidder not liable to loss till after confirmation.

The bidder not being considered as the purchaser until the report is confirmed, is not liable to any loss by fire, or otherwise, which may happen to the estate in the interim (*d*); nor is he until the confirmation of the report compellable to complete his purchase (*e*).

Reference to Master to inquire into title.

When the report has been absolutely confirmed, the purchaser is entitled to a conveyance, on payment of the purchase money, and may, after giving notice of his intention, apply to the Court for leave to pay his purchase money into the Bank, and to be let into the possession of the estate; but this application should, of course, not be made until the title be approved

(*y*) 1 Sugd. V. & P. 59.

(*z*) Coffin v. Cooper, 11 Ves. 600. It may be observed, also, that where the seal is continued beyond the first day, the motion cannot be made on any of the subsequent days that the seal continues; but must be reserved till the next seal. Anon. 1 P. Wms. 523; and vide sect. VIII. Report—'Confirmation of.'

(*a*) 1 Sugd. V. & P. 59; Vansittart v. Collier, 2 S. & S. 608.

(*b*) Chillingworth v. Chillingworth, 1 Sim. 291.

(*c*) 1 Turn. & V. 406.

(*d*) 1 Sugd. V. & P. 60; Exp. Minor, 11 Ves. 559; and vide 13 Ves. 518; 1 J. & W. 639.

(*e*) Anon. 2 Ves. J. 335.

of (*f*). For this purpose the Solicitor for the purchaser, before he suffers his client to part with his purchase money, usually applies to the plaintiff's Solicitor for an abstract of the title to the lots purchased (*g*), which he may be compelled to deliver by order as before pointed out (*h*); and if, upon looking into the abstract, he finds any objections to it which cannot be disposed of out of Court, he must procure an order to refer it to the Master to look into the title, when such proceedings may be adopted as have been already pointed out (*i*). The purchaser will be entitled to the costs of this reference, even though the Master reports in favour of the title (*k*). If the title prove bad, the purchaser will be entitled to be discharged on motion, and will be paid the costs of the reference out of any fund in Court, to the credit of the cause (*l*). If there is no fund in Court, the costs of the purchaser will be ordered to be paid by the plaintiff, without reference to the question how such costs ultimately are to be satisfied (*m*).

Method of Completing.

Cost of reference—where title good.

—where bad.

In sales under a decree, the purchaser should not only satisfy himself that the title to the property sold, is good, but he should ascertain that the sale has been made according to the decree; for it is a settled maxim of Equity, that persons purchasing under a decree of the Court, are bound to see that the sale is made according to the decree (*n*); and if the Master has sold *Greenacre* when he ought to have sold *Blackacre*, it is a good ground of objection (*o*). It is also the business of a purchaser, to see that all the persons who are necessary to convey are before the Court, for if he takes a title which a decree in an imperfect suit does not protect, he must abide the consequence (*p*). A purchaser, however, will not be affected by error in the decree; *e. g.* such as not giv-

Purchaser must see that sale is according to decree.

(*f*) 1 Sugd. V. & P. 61.
(*g*) 1 Turn. & V. 414.
(*h*) Ante, p. 871.
(*i*) Ibid. The Master's report upon such reference may be the subject of exceptions, post, 951.
(*k*) Fielder v. Higginson, 3 V. & B. 142.
(*l*) Reynolds v. Blake, 2 S. & S. 117.
(*m*) Smith v. Nelson, 2 S. & S. 557
(*n*) Colclough v. Sterum, 3 Bli. 181, 186.
(*o*) Lutwych v. Winford, 2 Bro. C. C. 251.
(*p*) Colclough v. Sterum, ubi supra, and vide Hamilton v. Houghton, 2 Bli. 169, Giffard v. Hort, 1 Sch. & Lef. 386; Bennett v. Hamill, 2 Sch. & Lef. 566.

Method of Completing.

ing an infant a day to shew cause, in cases in which a day ought to be given (*q*), or decreeing a sale of lands to satisfy judgment debts, without an account of personal estate (*r*). But where there there is an error in the decree, such as omitting to direct an inquiry whether the testator was a trader within the meaning of the bankrupt laws, the Court will not compel a purchaser to take an estate sold under it, even though the parties are proceeding to rectify the error (*s*).

purchaser may be at liberty to pay in purchase money.

If the title is satisfactory, notice of motion that the purchaser may be at liberty to pay in his purchase money into the Bank, must be served upon the Clerk in Court for the plaintiff. When the purchaser is liable to interest, the motion usually extends to the payment of interest, from the time at which his liability to interest commenced to the day of payment into Court, 'to be verified by affidavit.'

Rule as to possession and interest

in fee simple estates.

With respect to the time from which a party is entitled to possession of the thing purchased, and liable to interest on his purchase money, it may be mentioned, that the rule of Court in the case of the purchase of a fee simple estate, is to give the profits from the quarter day preceding the payment of the purchase money (*t*), and that, in conformity with this rule, the notice of motion for payment of the purchase money, generally prays that the purchaser may be let into the possession or into the receipt of the rents and profits of the estate from that time (*u*). The rule above stated, however, does not apply to collieries and mines, there being no such thing as quarter days in concerns of that description; the purchaser of such property is, therefore, only entitled to the profits from the commencement of the month in which he purchased, he paying his purchase money in the course of that month (*x*).

In collieries and mines.

—not altered because purchaser has had his money at bankers.

It is to be observed, that a purchaser of a freehold estate, is

(*q*) Ante, vol. 1, p. 225.

(*r*) Bennett v. Hamill, 2 Sch. & Lef. 566; vide etiam Lloyd v. Johnes, 9 Ves. 37; Curtis v. Price, 12 Ves, 89; Burke v. Crosbie, 1 B.' & B. 489; Lightburne v. Swift, 2 B & B. 2C ; Baker v. Morgan, 2 Dow. 526; Mullins v. Townshend, 1 Dow. & Clark, 430.

(*s*) Lechmere v. Brasier, 2 Jac. & W. 287.

(*t*) Anson v. Towgood, 1 J. & W. 637.

(*u*) Hand. 145.

(*x*) 1 Sugden V. & P. 62; Wren v. Kirton, 8 Ves. 502; Williams v. Attenborough, 1 T. & R. 70.

not entitled to the rents for a period beyond the quarter day preceding the payment of his money, merely because he has been ready to complete his purchase, and has had his money lying dead in his banker's hands; for he might have moved to pay the money into Court *without prejudice*, &c., when it would have been laid out; and this, if done by special application, would not have been an acceptance of the title (*y*).

Method of Completing.

Where purchaser takes possession without order.

If a purchaser gets into possession of the estate without the sanction of the Court, he will be compelled to pay the money into Court, although he entered with the permission of the parties in the cause, the Court only can give such permission (*z*).

Upon a resale,

If a resale is directed, the purchaser is entitled to the rents and profits from the quarter-day previous to the resale, and not from that preceding the original sale (*a*).

—in cases of reversionary estates;

A purchaser of a reversionary interest, will be ordered to pay interest on his purchase money from the time of his purchase (*b*).

—Of life interests in funds.

In the case of a sale of a life interest in the dividends of stock in the public funds, the purchaser is liable to interest, from the time of the contract, and is entitled to the next dividend which becomes due after the sale, even if it be on the day next after that of the sale (*c*). In the sale of an annuity, secured by deed and payable quarterly, a different rule appears to prevail; there the purchaser is considered as entitled to the annuity from the confirmation of the report, he paying interest from the first day on which the report might have been confirmed (*d*).

—of annuities.

As to paying off incumbrances out of purchase money.

If the estate is subject to an incumbrance, which appears upon the report, the purchaser instead of the usual notice of motion, should apply to the Court for leave to pay off the charge, and to pay the residue of the purchase money into the Bank, &c. (*e*). This, however, can only be done where the incumbrance appears on the Master's report; where this is not the case, and

(*y*) Barker v. Harper, Cooper, 32. Such an order appears to have been made by the V. C., Maurice v. Wainwright, 7 Nov. 1833, vide 2 Smith, 193.

(*z*) 1 Sugd. V. & P. 62.

(*a*) 2 Smith, 216.

(*b*) Trefusis v. Lord Clinton, 2 Sim. 359.

(*c*) Anson v. Towgood, 1 J. & W. 637.

(*d*) Twigg v. Fifield, 13 Ves. 517; vide Jackson v. Lever, 3 Bro. C. C. 605.

(*e*) 1 Sugd. V. & P. 61.

Method of Completing.

any of the parties refuse, or are incompetent to consent, a purchaser cannot apply any part of his purchase money in discharge of the incumbrance, though, perhaps, if the parties be all competent to consent and do consent, it may be done (*f*).

Two or more purchasers of one lot must join in motion to pay in purchase money.

Where two or more persons purchase one lot, the money must be paid altogether; the Court will not allow them to pay their proportions separately, on account of the confusion which might ensue (*g*).

Vendor only entitled to appear on motion.

Only the plaintiff's Solicitor, who, as we have seen, acts for all the parties, is entitled to appear on the motion to pay in the purchase money, and he must take care that the amount of the purchase money to be paid in, and the time when possession is sought, are correctly stated. He should also ask that any interest, or other money which the purchaser ought to pay, but which is not specified in the notice of motion, should be included in the order (*h*). He may also ask that the money, when paid in, may be laid out in the purchase of stock in the public funds, and accumulated, though if such a direction is omitted, it may be made the subject of a separate order.

Application that the money may be laid out.

Order that money be not paid out without notice to purchaser.

It is generally the practice, where the purchaser applies to pay in his purchase money, to ask, on his behalf, that it may not be paid out again without notice to him. The object of this is, to give him a lien upon the purchase money, till possession has been delivered, and the conveyance has been completed; but the Court will not impound the money, upon an objection from the purchaser, grounded on notice of an adverse claim. If evicted, he must resort to the covenants in his conveyance (*i*); nor will the Court prevent the distribution of the purchase money because the heir is an infant, or retain any part of it to answer the expense of a fine, which would become payable upon his coming of age (*k*).

Effect of.

When a 'stop order,' to the effect above stated, has been made, the purchase money cannot be distributed without the consent of the purchaser given in Court, or serving him with a copy of the order for setting down the cause for further directions, or of the petition for the distribution of the fund, and

(*f*) 1 Sugd. V. & P. 61; —— v. Stretton, 1 Ves. jun. 266.

(*g*) Darkin v. Marye, 1 Anst. 22.

(*h*) Vide 2 Smith, 189.

(*i*) Thomas v. Powell, 2 Cox. 394.

(*k*) Morris v. Clarkson, 3 Swanst. 558.

producing an affidavit of such service at the hearing of the cause or of the petition.

Method of Completing.

Delivery of possession to purchaser how enforced.

An order for letting the purchaser into possession, when the party in possession is a party to the suit, may be enforced by a short order, and attachment thereupon, followed by a writ of assistance (*l*). Some doubt, however, appears to be entertained whether such a proceeding can be adopted by the purchaser himself; and it is stated that the proper course is for the *plaintiff*, or other parties to the suit, to proceed against the person withholding the possession; and that, if he refuses to do so, the purchaser should serve a notice of motion that the plaintiff may procure possession to be delivered to him within a given time, and that the costs of the application may be paid out of the estate (*m*). This, however, is at variance with the course of proceeding which was adopted in *Dove* v. *Dove* (*n*), in which the application for the order to deliver up the possession was made by the *purchaser*, who was not a party to the cause, and was followed by orders for the usual process of contempt, at the instance of the same person. It is right, however, to mention, that, in a very recent case (*o*), Lord Cottenham appeared to take a distinction between an application to enforce the execution of a conveyance, and one to compel the delivering up of the possession of the estate to a purchaser; his Lordship said, 'that, in the case of possession, there is, no doubt, an advantage in having the plaintiff to do it, *because he has the use of certain writs, which do not belong to a person not a party.*'

Conveyance, how prepared.

The purchaser, upon payment of his purchase money into Court, is entitled to a conveyance of the estate, and it is incumbent on his Solicitor to prepare the draft of the conveyance, and to tender it to the vendor's Solicitor for his approbation (*p*). If objections are made to the draft which the Solicitors cannot

(*l*) 2 Harr. 8 ed. ante, p. 723.

(*m*) 2 Smith, 214.

(*n*) 2 Dick. 617; 1 Bro. C. C. 375; 1 Cox. 101, S. C. From the manner in which this case is reported in Dickens, it appears doubtful whether the applications for the injunction and writ of assistance were made by the purchaser himself, or by the plaintiff on his behalf; but on referring to the Registrar's book, it will be found that the orders, in all instances, were applied for and obtained by the purchaser, Joseph Atkinson. Vide S. C. Reg. lib. 1783, A. fos. 47 & 327, and the intermediate orders, ibid. 17th Feb. 1st April, 1st May, 1784.

(*o*) Sitwell v Mellersh, L. C., 16th Dec. 1839, vide next page.

(*p*) 1 Turn. and V. 421.

Method of Completing. Reference to the Master to settle draft.

decide, and neither the decree nor the order for paying in the purchase money authorize the Master to settle the conveyance, an order of reference to the Master to settle the conveyance, with the usual directions for the production of the title deeds, &c. (*q*), must be obtained and served, and, with the draft of the conveyance, must be left at the Master's Office, when the course already pointed out, with respect to the settlement of conveyances by the Master, will be pursued (*r*).

Execution of how enforced.

The conveyance having been settled and ingrossed, must be executed by the parties, and if any party refuses, an application should be made to the Court for an order that he may execute it. This application may be made by the purchaser, and in a recent case (*s*), where a motion was made by a purchaser, to the effect that the plaintiff might be ordered to procure the concurrence of a defendant in the conveyance, the Vice-Chancellor, and afterwards the Lord Chancellor, refused the application, on the ground that in sales under a decree, the Court, and not the plaintiff, is the vendor, and that in the case of a conveyance, the Court will compel a party to convey, at the instance of the purchaser, without the circuity of getting the plaintiff to enforce the execution of the agreement.

Delivery up of title deeds.

The conveyance being executed, the purchaser is entitled to have the title deeds relating to the estate delivered up to him. A direction for the delivery of them frequently forms part of the order for payment of the purchase money into Court; if it does not, and the documents are in the Master's Office, an order that they may be delivered to him, may be obtained by the purchaser, upon motion (*t*). Where there are several lots, and the purchaser has not bought them all, the form of the order, generally, is ' that such of the title deeds, &c., as relate solely to the lot purchased, and also such as relate to the same jointly with other lots of less value, be delivered to the purchaser, or to whom he shall appoint, he submitting to produce such last-mentioned deeds and writings, on necessary occasions, and to enter into a covenant for that purpose, and to give attested

Form of order.

(*q*) Ante, p. 807.
(*r*) Ante, p. 899.
(*s*) Sitwell v. Mellersh, L.C. 16th Dec. 1839, ex relatione.
(*t*) Hand. 154.

Method of Enforcing.

copies thereof, when required, at the expense of the party requiring the same; but as to such title deeds, as relate to the estate purchased jointly with other estates of greater value, he is to have attested copies thereof at the expense of the estate; and the persons entitled to such estates of greater value, are to execute to him the like covenants, to produce such deeds and writings, on necessary occasions; and in case any dispute shall arise between the parties touching the copies of any particular deeds, the said Master is to settle the same' (*y*).

One order may embrace the delivery of all the deeds to the purchasers of the several lots.

General rule as to title deeds.

It may be mentioned here, that the rule laid down in the above order, (which was settled by Lord Hardwicke), is the rule generally adopted by the Court with regard to the right to the title deeds of an estate sold by order of the Court. In *Kinnard* v. *Christie* (*z*), Lord Eldon determined, that the purchaser of the largest lot is to have the title deeds, and not the purchaser of several lots, although such several lots together were larger than the largest single lot.

Method of enforcing contract on behalf of vendor.

We have hitherto discussed the course of proceeding to complete a sale, as applicable to those cases only in which the purchaser is desirous and willing to complete it himself. It may, however, happen, that, after he has been purchaser of a lot, he becomes unwilling to complete his purchase—in that case it is for the vendor, or rather for the Solicitor of the plaintiff, who, as we have seen (*a*), is the person who acts on behalf of all parties, to take the necessary steps to compel him.

Report must be first confirmed.

The rule, that the Master's report of a purchase must be absolutely confirmed before the contract can be considered as binding, applies equally to cases in which it is sought to com-

(*y*) Hand. 152.

(*z*) March, 1809; cited 2 Smith, 195.

(*a*) Ante, p. 902.

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pel a purchaser to complete his purchase, as where it sought to enforce the contract against the vendor (*b*). As a preliminary step, therefore, towards enforcing the completion of the contract, it is necessary to have the report confirmed (*c*). This may be done, by the plaintiff's Solicitor obtaining the report from the Master's Office, and procuring the usual order *nisi*, that the report may be confirmed within a limited time, unless cause is shewn to the contrary (*d*); and serving it upon the purchaser in person, as well as upon the Clerks in Court of the other parties to the suit. If no cause is shewn, then he must proceed to have the report confirmed, absolutely, in the manner before pointed out (*e*). Where the purchaser has already obtained an order *nisi*, the plaintiff may, as we have seen, proceed to confirm it, absolutely, without a fresh order *nisi* (*f*).

Discharge of incompetent purchaser.

Having confirmed the report of the Master, an important consideration arises, viz. whether the purchaser is in a situation to complete his contract; for if he is not a responsible person, it will be better that the matter should stop here, than that any further expense should be incurred. If, therefore, it should appear that the purchaser is unable to perform his contract, a motion should be made to discharge him from his bidding, and that the estate may be resold with the approbation of the Master (*g*). An order may be made upon this motion, with the purchaser's consent (*h*); but if he does not consent, notice of it should be served on the purchaser, and it should be supported by an affidavit of the facts upon which it is considered right to make it. In *Hodder* v. *Ruffin* (*i*), the affidavit stated, that since the confirmation of the report, the purchaser was confined for debt in the King's Bench Prison, and, as deponent had been informed and believed, was wholly insolvent and incapable of completing the purchase; and the order was made, although the purchaser, having been served, did not appear.

(*b*) Anon. 2 Ves. jun. 336.
(*c*) Ibid.
(*d*) Ante, p. 909.
(*e*) Ante, p. 910.
(*f*) Ibid.
(*g*) Hodder v. Ruffin, 1 V. & B. 544, 1 Sug. V. & P. 60; Cunningham v. Williams, 2 Anst. 344.
(*h*) Hand. 153.
(*i*) Ubi supra.

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—where he is insane.

It may be mentioned here, that if it is discovered that the purchaser was insane at the time of the bidding, he may be discharged from his purchase. The Court, however, will not, in such case, direct the next best bidder to be declared purchaser, although asked to do so on behalf of all the parties in the cause, and the bidder consents, but will direct a resale (*k*).

Motion that purchaser may pay in money.

If the purchaser is responsible, he will not be permitted to baffle the Court; and, therefore, instead of discharging him from his bidding, the Court will, if required, make an order that he shall, within a given time, pay the money into Court, and be let into possession (*l*). Upon hearing the motion for this order, the Court will, if the purchaser appears and asks for it, and has not precluded his right to object to the title, direct a reference to the Master to inquire whether a good title can be made (*m*). The purchaser may, also, set up any claim he may have to compensation for any deficiency (*n*). Some doubt appears to exist, as to whether such an order can be obtained in the absence of the purchaser, without a previous reference to the Master to inquire into the title; but, in a case before Lord Erskine, mentioned by Sir Edward Sugden (*o*), where a motion to the above effect was made, upon which the purchaser did not appear, his Lordship refused the motion, but ordered the title to be referred to the Master, and then, he said, if a good title could be made he would compel the payment of the money according to the usual practice.

Reference as to title.

—as to compensation.

—not necessary unless asked for.

The same rule was laid down by Lord Thurlow in *Bannister* v. *Way* (*p*), and appears to have been acted upon by Lord Eldon in *Hodder* v. *Ruffin* (*q*), and in *Sanders* v. *Grey* (*r*); and it has been recently acknowledged by Lord Langdale, M. R. (*s*), so that it seems to be now the undoubted practice of the Court, that, before an order can be made to compel an absent purchaser to pay in his money, the Solicitor for the plaintiff must

(*k*) Blackbeard v. Lindigren, 1 Cox. 205.

(*l*) 1 Newl. 335.

(*m*) Ibid. 336.

(*n*) 2 Smith, 202.

(*o*) 1 Sug. V. & P. 60, n. 1.

(*p*) Ex relatione E. D. Colville, Regist.; vide etiam Reg. Lib. A. 1788, 425. S. C.

(*q*) Cited 1 Newl. 336, and vide Reg. Lib. A. 1810, 44. S. C.

(*r*) This case is cited by Mr. Newland, vol. 1, p. 337, as an authority for the contrary proposition, but upon reference to the Registrar's book it appears that a reference was made to the Master to inquire into the title. Reg. Lib. B. 1810, 456.

(*s*) Smart v. M'Lellan, Rolls, 14 Jan. 184[illegible].

Method of Enforcing.

deliver to the purchaser an abstract of the title, and procure the Master's report that a good title can be made (*p*).

Service of order.

The order for payment of the purchase money being made, must be served personally upon the purchaser, and, if not complied with, may be enforced by moving that he may pay in the money within a limited time, either from the date of the order, or from the service of it upon him, or stand committed to the Fleet (*q*). The order made upon this motion must be served personally upon the purchaser a sufficient time before the payment is to be made, and, on an affidavit of such service, and production of the Accountant-General's certificate that the money has not been paid in, an order will be made on a motion, as of course, that the purchaser do stand committed to the prison of the Fleet. The warrant for committal is then signed by the Judge who makes the order, and the purchaser is taken into custody by the deputy-Warden of the Fleet attending the Court (*r*).

Order for committal.

Or for sequestration in case of Peers, &c.

Where the purchaser is a Peer or Member of Parliament, the motion for payment of the purchase money, instead of praying a committal on default, should pray a sequestration, as in the case of default made by a privileged person in producing books, &c., pursuant to a decree (*s*).

Order for a resale of estate,

—and that purchaser shall make good the deficiency.

It may be stated here, that, besides the course of proceeding above pointed out for compelling a purchaser to pay in his purchase money, the practice of the Court furnishes another mode by which the persons interested in the property may be secured against loss, from the purchaser's refusal to complete his contract, by directing a resale of the estate and compelling the purchaser to make good any deficiency in the price obtained at such resale. Thus, in *Sanders* v. *Gray* (*t*), an order was made for the purchaser to complete his purchase, or that the estate should be resold; and the order directed the purchaser, in the last alternative, to pay the deficiency, and the costs occasioned by his not completing the purchase, and of the re-

(*p*) Ante, p. 910.

(*q*) Lansdown v. Elderton, 14 Ves. 512. This order may be obtained where the purchaser has procured an order to pay in his purchase money, but has omitted to do so. 2 Smith, 207.

(*r*) Vide 2 Smith, 203.

(*s*) Ante, p. 811, n. (e).

(*t*) Reg. Lib. 1811, B. p. 1090. 2 Smith, 205; vide etiam Fourmer v. Duke of Kent, ibid.

sale. A similar order appears to have been made by the Vice Chancellor, in *Tanner* v. *Radford* (u); and, in a recent case (x), Lord Cottenham said that he would communicate with the other Judges of the Court; and, if they saw no objection to making the order, in *Sanders* v. *Gray*, the rule of the Court, he thought it would be proper that it should be so;—and his Lordship afterwards said (y) that he had communicated with the Master of the Rolls and the Vice Chancellor, and that they both agreed with him that such would be the practice to be followed hereafter.

Method of enforcing.

A sale before a Master, is not within the Statute of Frauds, and after a confirmation will be enforced against the representatives of the purchaser, although not signed; the judgment of the Court taking it out of the Statute (z). The Court, however, cannot enforce the contract against them without a suit, but it will allow the heir to have the benefit of the contract, upon payment of the purchase money, leaving it to him to compel the executors to reimburse him, if they have assets; and, where the heir refused to accede to this arrangement, the Court directed a resale, reserving the consideration as to any deficiency that might arise on the resale, and by whom the costs of it were to be repaid (a).

Against the representative of purchaser.

Heir may come in and take the benefit of the contract.

From what has been stated, it will be perceived, that where a sale has been fairly and properly conducted, and the party is able to complete his contract, he will be held strictly to his bargain. Where, however, the contract is unreasonable, the Court will relieve the purchaser as well as the seller (b). Thus, in *Savile* v. *Savile* (c), a purchaser at a sale under the Court, which took place about the time of the South Sea bubble, was discharged from his purchase on submitting to forfeit his deposit, on the ground of the exorbitance of the price.

Of rescinding the contract on behalf of purchaser.

Only where there are equitable circumstances,

With respect to the last case, however, it is to be observed that there can be no doubt, now, that the circum-

(u) V. C. 8 May, 1834. MSS.

(x) Harding v. Harding, L. C. 8 Nov. 1839.

(y) Ibid. 10 Dec. 1839. The order, in such case, should not be to discharge the purchaser, but to hold him to his contract, vide etiam Lord v. Lord, 1 Sim. 503.

(z) 1 Sugd. V. & P. 65, cites Attorney-General v. Day, 1 Ves. 218.

(a) Lord v. Lord, 1 Sim. 503.

(b) 1 Sugd. V. & P. 71.

(c) 1 P. Wms. 745.

Rescinding Contract.

—and not on ground of excess of price.

stance, that the price given is much beyond the value of the estate, will not be, of itself, a sufficient ground to release a purchaser from his contract, even upon the terms of forfeiting a deposit (*d*). Where, however, the purchaser has, by *mistake*, given an unreasonable price for an estate, the Court will, in a proper case, wholly rescind the contract (*e*). But if a person without authority, interfere in a sale and bid, although he does it to prevent the property being sold at an undervalue, the Court will not release him (*f*).

Person bidding without authority held to his bargain; although he does it for the benefit of the estate.

It is to be remarked, that if a purchase be rescinded, after the purchaser has paid his money into Court, he must, if it it has been laid out upon his application, take back the stock, whether the funds have fallen or risen since the investment (*g*).

Substitution of another Purchaser.

It may be mentioned here, that if, after becoming the bidder for an estate, the purchaser is desirous of being discharged from his contract, and of substituting another person in his stead, the Court will, on motion, make an order to that effect; he must, however, support his motion by an affidavit that there is no under-bargain, for the new purchaser may give the other a sum of money to stand in his place, and so deceive the Court (*h*): and the rule appears to be, that if a purchaser resell behind the back of the Court before his purchase is confirmed, the second purchaser is considered a substituted purchaser, and must pay the additional price into Court for the benefit of the estate (*i*),

Where resale at a profit

Of opening Biddings.

Where estates are sold before a Master, under the decree of a Court of Equity, the Court considers itself to have greater

(*d*) 1 Sugd. V. & P. 71, and the case of General Birch's estates there cited, and vide Sewell v. Johnson, Bunb. 76.

(*e*) 1 Sugd. V. & P. 72, Morshead v. Frederick, cited ib.

(*f*) Nelthorpe v. Pennyman, 14 Ves. 517.

(*g*) Hodder v. Ruffin, V. C., 21 Mar. 1825, cited Sugd. V. & P. 71.

(*h*) Rigby v. Macnamara, 6 Ves. 515, Vale v. Davenport, ib. 615; formerly, the practice appears to have been, to make the order on consent of all parties without such affidavit, Matthews v. Stubbs, 2 Brown, 391.

(*i*) Hodder v. Ruffin, 1 Tamlyn, 341.

power over the contract than it would have were the contract made between party and party (*h*); and, as the chief aim of the Court is to obtain as great a price for the estate as can possibly be got, it is in the habit, after the estate has been sold, of '*opening the biddings*,' that is, of allowing a person to offer a larger price than the estate was originally sold for, and, upon such offer being made, and a proportionate deposit paid in, of directing a resale of the property.

Opening Biddings.

What.

Any person may open the biddings, and there seems to be no doubt that a person who is interested in the produce of the estate, such as a residuary legatee (*i*), or a tenant for life or reversioner may do so (*k*), but the opinion of the Court appears to have fluctuated upon the question, whether the Court will entertain an application to open biddings on behalf of a party who was present at the sale. In *M'Cullock* v. *Cotbatch* (*l*), Sir J. Leach, V. C., refused such an application; but in *Thornhill* v. *Thornhill* (*m*), Lord Eldon held, that, although the circumstance that the person proposing to open the biddings had been present at the sale, might be an objection, yet many cases might be put, in which it would be impossible to act upon it as a general rule, and that each case must be governed by its own circumstances; and, in *Tyndale* v. *Warre* (*n*), the same learned Judge said, that although the Court looks with jealousy at the circumstance of the person applying having attended the sale, the way in which that jealousy had been exercised was by expecting a larger offer to be made, under the idea of having a compensation by the largeness of the offer for any loss that may have arisen from the want of competition at the sale. In that case, his Lordship permitted the biddings to be opened on an advance of £600 offered upon £3800; and the same principle was afterwards acted upon in *Lefroy* v. *Lefroy* (*o*), by Lord Lyndhurst, who refused to open biddings on behalf of a person who was

Who may open biddings.

Party present at sale.

But must make a larger offer than any other.

(*h*) Vide Savile v. Savile, 1 P. Wms. 747.

(*i*) Hooper v. Goodwin, Coop. 95.

(*k*) Williams v. Attenborough, T. & R. 70.

(*l*) 3 Mad. 314; vide etiam Somner v. Charlton cited 5 Ves. 655; Preston v. Barker, 16 Ves. 140.

(*m*) 2 J. & W. 347.

(*n*) Jac. 525.

(*o*) 2 Russ. 606.

Opening Biddings.

present at the sale, upon an advance of £300 upon £12,010, but ordered it to be done if £500 were offered and deposited.

Biddings opened more than once,

It is to be noticed, that mere advance of price, if the report of the purchaser being the best bidder is not absolutely confirmed, is sufficient to open the biddings, and that they may be opened more than once (*p*). It may also be mentioned, that in *Preston* v. *Barker*(*q*), where a defendant, who had obtained an order to open biddings, but was outbid at the second sale, applied to open the biddings again upon an advance of £150 upon £1335, Lord Eldon, although he expressed considerable doubt whether the Court could entertain a second application by the same party, yet as it appeared that notice of the motion had been given to the purchaser, who did not appear, he made the order, on the terms of the applicant paying all the costs.

—by same party,

but only when purchaser does not oppose *Semble.*

Rule as to amount of advance,

—not limited to £10 per cent.

With respect to the advance which the Court will consider necessary to be deposited, before it will permit the biddings to be opened in ordinary cases, it is to be noticed, that an advance of £10 per cent. was formerly considered to be sufficient on a large sum (*r*); but in *Andrews* v. *Emerson* (*s*), Lord Eldon said, that the rule of £10 per cent. was not a wise rule to establish, as the consequence was, that you never got more, and desired it to be observed, that in future there should be no such rule. In *White* v *Wilson* (*t*), his Lordship repeated the same opinion as to the impolicy of such a rule, but nevertheless said, that in some cases he should be satisfied with that, (*i. e.*, an advance of £10 per cent.); in some, he should be satisfied with less; and in some, he should require more. And accordingly, in *Brooks* v. *Snaith* (*u*), it being a creditors' suit, his Lordship permitted the biddings to be opened upon an advance of £5 per cent. on £10,000. In

(*p*) 1 Sugd. V. & P. 66; Scott v. Nesbitt, 3 Bro. C. C. 475.

(*q*) 16 Ves. 140.

(*r*) Anon. 3 Mad. 494. In many cases, however, the Court has opened biddings upon a less advance. Vide Tait v. Lord Northwick, 5 Ves. 655, where the biddings were opened on an advance of £200 on £2360; and Anon. 5 Ves. 148, where the Court refused to open the biddings on an advance of £100 upon £3200, but opened them on an advance of £200.

(*s*) 7 Ves. 420.

(*t*) 14 Ves. 151.

(*u*) 3 V. & B. 144.

Garstone v. *Edwards* (*x*), however, Sir J. Leach, V.C., who appears to have been favourable to an adherence to the rule of £10 per cent. (*y*), refused an offer of £350, being at the rate of six and a half per cent. on £5300, observing, that the case cited (*z*) merely established, that where an advance so large as £500 was offered, the Court would act upon it, though it was less than £10 per cent. (*a*); so that, on the whole, it may be concluded that, although in the case of an advance of so large a sum as £500, the Court will permit the biddings to be opened, even if it is under £10 per cent., yet the Court, in ordinary cases, considers £10 per cent. (which is the usual amount of the deposit paid upon sales by auction out of Court,) as a proper deposit to be paid when biddings are opened (*b*).

Opening Biddings.

—though that is a fair general rule.

When, however, the timber upon a lot sold has been taken at a valuation, the advance must be calculated upon the amount of the timber, as well as upon the price of the lot (*c*) And it is to be observed, that, whatever the rate of the advance offered may be, the Court will not permit biddings to be opened unless the deposit offered amounts to at least £40 (*d*). Thus where, upon a sale before a Master, two lots were sold, one for £656, and the other for £91, and a person applied to open the biddings, at an advance of £70 on the first lot, and £30 on the other, the Vice-Chancellor, Sir J. Leach, refused to make the order as to the second lot, the advance being under £40; but his Honor recommended the party moving to give a new notice of motion, that the biddings for the two lots might be opened, and that a resale might take place upon one lot, upon an advance of £100 on the two lots (*e*). In a similar case, however, the present Vice-Chancellor, Sir L. Shadwell, although he allowed the biddings to be opened upon an advance of £160 upon £750 for all the lots, refused to alter the original scheme of the sale without some reason being assigned for it (*ee*).

Rule when timber has been valued.

Biddings never opened unless £40 deposited;

—but biddings for two lots may be opened upon offer of above £40 for both;

It may be mentioned here, that in *Watts* v. *Martin* (*f*), where an estate had been sold before the Master, in separate

—application must be to sell the two lots in one,

(*x*) 1 S. & S. 20.
(*y*) Vide Anon. 3 Mad. 494.
(*z*) Brooks v. Snaith, ubi supra.
(*a*) Vide etiam Lefroy v Lefroy, 2 Russ. 606, ante p. 923.
(*b*) Vide Anon. 3 Mad. 494.
(*c*) Bates v. Bonner, 6 Sim. 380.
(*d*) Farlow v. Weildon, 4 Mad 460, vide Leland v. Griffith, 2 Moll. 510.
(*e*) Brookfield v. Bradley, 1 S. & S. 23.
(*ee*) Ward v. Cooke, 9 Sim 88.
(*f*) 4 Bro. C. C 113.

Opening Biddings.

lots, and an application was made that it might again be put up to sale in one lot, a considerable advance having been offered, the purchasers of the lots opposed the motion, on the ground that, in the expectation of a sale in different lots, they had expended their time and money, in making surveys, &c., of the estate, which they would not have done had they known that the estate was to be sold in one lot; and that in making the order, (which was consented to by the residuary legatee and trustee,) the Court, in consequence of the hardship of the case, directed the party applying to open the biddings to pay the *costs, charges, and expenses,* occasioned to the purchasers by the biddings, to be settled by the Master, in case the parties differed (*g*).

—but purchasers will be allowed charges and expenses of valuation, &c.

Court will not favour any person,

In that case, the Court favoured the applicant, by departing, to a certain extent, from its ordinary rules; in general, however, as the biddings are merely opened for the benefit of the suitor, the Court will not step out of its course to favour any other person; therefore, where a motion was made to open a bidding of £5020 on an advance of £150 only, on the ground that the party had mistaken the time of sale, the Lord Chancellor held the circumstance, that the bidder was too late, to be no ground at all, and said he would not open the bidding for a less over-bidding than £500 (*h*).

—by opening biddings on a small deposit.

When biddings are opened, purchaser is discharged from purchase,

Where the biddings are opened, the purchaser is entirely discharged from his purchase; and if he has paid a deposit, or any part of the purchase money, into Court, he will be entitled to have it paid out to him. If he is the purchaser of more lots than one, and the biddings are ordered to be opened as to some of the lots which were first purchased, the purchaser will be allowed to have the biddings opened, and to be discharged from his purchase, as to all the lots which he has purchased, it being considered but reasonable, that if, having become the purchaser of a subsequent lot, in consequence of his being declared the best bidder upon the prior lot, he should, if he is deprived of the purchase of the first lot, have the option of retaining or retiring from the subsequent lots (*i*). The

—and from subsequently purchased lots.

(*g*) Vide S. C. Ed. Belt. 113.
(*h*) Anon. 1 Ves. jun. 453.
(*i*) Price v. Price, 1 S. & S. 386. Vide etiam Fielder v. Fielder; cited ibid, and Boyer v. Blackwell, 3 Anst. 656.

purchaser, in order to entitle himself to such an indulgence, should appear upon the motion to open the biddings, and produce an affidavit that he had bid for the subsequent lots in consequence of his having been declared the best bidder for the first lot (*k*). It may be mentioned, with reference to this subject, that where an estate was put up in four lots, and, at the the sale, A. purchases lot 1, and, there being no other bidders, the other lots were bought in, and, afterwards, B. opened the biddings, and, on the resale, became the purchaser of lots 1, 2, and 3, whereupon A. applied to open the biddings of lots 1 and 2, the Court would not permit him to do so, unless he would agree to take lot 3, in case B. should retire from it, at the price it had been sold for to B. in case it should not fetch the same price at the resale (*l*).

Opening Biddings.

Party applying to open biddings upon two lots not allowed to do so, unless he would agree to take a third.

It may be observed, that the rules which regulate the practice of opening biddings upon the sale of a landed estate, do not apply when a colliery is the subject of the sale. In *Williams* v. *Attenborough* (*m*), where the colliery had been sold in one lot for £8850, the Vice-Chancellor, Sir J. Leach, directed the biddings to be opened upon an offer to give £10,000, but Lord Eldon, upon motion, discharged the order, on the ground that in the event of any body else bidding more at the second sale, and being declared the highest bidder, the purchaser would be discharged and his deposit could never be made a security for a subsequent bidder, and, in the meantime, from the fluctuating nature of the property, a depreciation might take place, then, if the highest bidder at the second sale should not prove to be a *bonâ fide* purchaser, a loss would be occasioned to the owners of the property. His Lordship said that, in *Wren* v. *Kirton* (*n*), the Court was disposed to open the biddings, if security were

Rule as to collieries.

(*k*) Vide Fielder v. Fielder, ubi supra.

(*l*) Bates v. Bonner, 6 Sim 380.

(*m*) T. & R. 70.

(*n*) 8 Ves. 502. This case affords a remarkable illustration of the danger of opening biddings in the case of collieries. On the first sale, the colliery was sold for £23,000; the Court opened the biddings, as it turned out, for a fictitious bidder. Afterwards the biddings were again opened, and the lot put up for sale three times, on the two first occasions the sum bid fell to £12,000 and £6000; at the last sale it was sold for £15,000, and there was an actual loss of the difference between £23,000 and £15,000.

Opening Biddings.

given to answer the difference between the produce of the re-sale and of the original sale; but that it was extremely difficult to manage the security, unless the whole money were paid into Court, to remain in Court as a pledge that the next purchaser shall perform his contract.

After the report has been confirmed.

The proper time for opening the biddings is before the Master's report of the sale has been confirmed absolutely; after that, increase of price alone, however large, is not sufficient to induce the Court to grant the application, although it is a strong auxiliary argument when there are other grounds (*o*). In a case (*p*), however, before Lord Rosslyn, this rule, although so frequently acknowledged and acted upon, was not attended to, but biddings were opened after the report was absolutely confirmed, merely on an advance of price. This case is now completely overruled (*q*).

Only upon very particular circumstances,

But very particular circumstances may, perhaps, induce the Court to open the biddings, after confirmation of the report, if the advance be considerable. Thus, in a case (*r*), where the owner of the estate (who joined in a motion for the purpose of opening biddings, after the report was absolutely confirmed,) was in prison at the time of the confirmation, and it appeared that he would have opened the biddings before confirmation of the report, had he been able; and had even directed persons to bid more than what the estate sold for, who deceived him, and an advance of £4000 (being more than one-fourth of the original purchase money,) was offered, the biddings were opened on the deposit of the £4000 being made.

—arising out of the character of the purchaser as connected with the estate,

Strong as the circumstances in this case were, Lord Eldon, in a subsequent case, expressed great disapprobation of the decision, and determined, generally, that, after a purchaser has confirmed his report, unless some particular principle arises out of his character, as connected with the ownership of the estate, or some trust or confidence, or his own conduct in obtaining his

(*o*) 1 Sudg. V. & P. 67.

(*p*) Chetham v. Grugeon, 5 Ves. 86; and see his Lordship's decision, when Lord Commissioner, in Prideaux v. Prideaux, 1 Bro. C. C. 287.

(*q*) 1 Sugd. V. & P. 67.

(*r*) Watson v. Birch, 2 Ves. jun. 51; 4 Bro. C. C. 172, S. C.

report, the bidding ought not to be opened (*s*). Lord Redesdale, also, in a case before him, held that biddings could not be opened after the report was absolutely confirmed, unless on the ground of fraud on the part of the purchaser; and said he considered it to the advantage of suitors to observe greater strictness in opening biddings, as it would procure better sales (*t*). And in a still later case, Lord Eldon adhered to the same rule, and said that he could not do a thing more mischievous to the suitors, than to relax further the binding nature of contracts in the Master's Office, half the estates that are sold in the Court being thrown away, upon the speculation that there will be an opportunity of purchasing them afterwards, by opening the biddings (*u*).

Opening Biddings.

Fraud will, of course, be a sufficient ground for opening the biddings. Therefore, if the parties agree not to bid against each other (*x*), or if a survey be made of an estate with some degree of collusion with the tenants, and it misrepresents the value and quality of the estate, and some of the purchasers are aware of this fraud in making the survey, and the owner is ignorant of it (*y*); or if the purchaser of the estate be partner with the Solicitor in the cause, and is in possession of some particular knowledge, to the benefit of which the other parties were entitled (*z*); in all these cases the Court will open the biddings, although the report had been absolutely confirmed.

—or in cases of fraud.

When a person is desirous of opening a bidding, he must, at his own expense, apply to the Court, by motion, for that purpose, stating the advance offered. Notice of the motion must be given to the person reported to be the purchaser of the lot, as well as to the parties in the cause (*a*). If the Court approve of the sum offered, the application will be granted,

Biddings to be opened at expense of applicant.

Service of the order.

(*s*) Morice v. the Bishop of Durham, 11 Ves. 57.

(*t*) Fergus v. Gore, 1 Sch. & Lef. 350.

(*u*) White v. Wilson, 14 Ves. 151.

(*x*) See Watson v. Birch, 2 Ves. jun. 52.

(*y*) Ryder v. Gower, 6 Bro. P. C. 306; and see Watson v. Birch, 2 Ves. jun. 53.

(*z*) Price v. Moxon, July 14, 1754, before Lord Hardwicke; Ryder v. Gower, ubi supra; and see Watson v. Birch, 2 Ves. jun. 51.

(*a*) 1 Sugd. V. & P. 60.

Opening Biddings.

and, on the order being drawn up, entered, and served, a new sale must be had before the Master.

Terms of the order.

The order is, in general, drawn upon the condition that the party applying do immediately pay the deposit (*b*). He must also bear the expense of paying in his deposit, and pay the costs of the first purchaser. When the first purchaser has paid in his money, and the purchase money or any part of it has not been laid out, he must pay interest at the rate of £4 per cent. on the money, or such part of it as the Master shall find to have lain dead (*c*). When, however, the purchase money has been laid out at the instance of the purchaser, he must take back the stock, whether the funds have fallen or risen since the investment (*d*). The applicant must also, if the estate has been sold in several lots, and he applies to have it resold in one lot, pay the original purchasers any charges and expenses they may have been put to, in having surveys made, &c., preparatory to the bidding (*e*).

No special directions as to expenses.

These were the terms of the order in *Watts* v. *Martin* (*ee*), which have been before alluded to. The order in that case, however, was special, and made to meet the circumstances of the case, for in ordinary cases the Court will not give any particular directions, and where an application was made to Lord Thurlow, upon a motion to open biddings, for a direction to the Master to include, in the costs of the purchaser, the expense of a journey to the estate, his Lordship refused to give any particular directions, saying the Master would, under the general directions, make the allowance, according to the practice (*f*).

Proceedings on resale.

The proceedings upon the resale will be the same as those upon the original sale (*g*). It is said, in a book of the highest authority, that if the biddings are opened, the estate may be allotted for sale in a different manner (*h*). It is not, however, stated whether an order is necessary to warrant such a variation; but in the case to which the learned author refers as the authority for his position, the alteration of the allotment was

Lots cannot be altered without special order, *semble.*

(*b*) Anon. 6 Ves. 5'2.
(*c*) 1 Sugd V. & P. 66.
(*d*) Ibid 71, ante, p. 922.
(*e*) Vide ante, 925.
(*ee*) 4 Bro. C. C. 113.
(*f*) Anon. 2 Ves. jun. 286.
(*g*) 2 Smith, 216.
(*h*) 1 Sugd. V. & P. 69.

directed by the order for opening the biddings (*i*), and was accompanied with very particular directions (*k*).

Opening Biddings.

Party opening biddings discharged if outbid at resale.

Where biddings are opened and a resale takes place, the person at whose instance the biddings were opened will, if he is outbid at the resale, be discharged, and will be entitled to receive back his deposit (*l*); but he will not be entitled to an allowance for his costs, as they are in the nature of a premium paid by him for the opportunity of bidding (*m*). Where, however, the biddings have been opened for the express benefit of the family, costs have been allowed (*n*).

Solicitor opening biddings on behalf of a person who did not exist,

Where a Solicitor obtained leave to open biddings on behalf of one George Beauchamp, and, upon the resale, a person, who was declared the highest bidder, turned out to be a sham bidder, and did not complete his contract, Lord Hardwicke discharged the report of his being the best bidder, and, it being admitted by the Solicitor that there was no such person as George Beauchamp, his Lordship ordered the Solicitor to stand as best bidder at the price at which he had opened the biddings (*o*).

ordered to stand as purchaser.

Sales by Private Contract.

Sales by private contract.

It has been stated, that where an estate is sold by order of the Court, the sale is generally effected by public auction, the Court will, however, where it is for the interest of the parties, depart from its usual course and allow of the property being disposed of by private contract; it is, however, to be observed, that where there has been a decree for sale before the Master in the ordinary form, the parties will not be at liberty to depart from that form, without an order to warrant it (*p*);

(*i*) Watts v. Martin, 4 Bro. C. C. 113.

(*k*) Vide ante, p. 925.

(*l*) Williams v. Attenborough, T. & R. 77.

(*m*) Rigby v. M'Namara, 6 Ves. 466; Earl Macclesfield v. Blake, 8 Ves. 214; Trefusis v. Clinton, 1 V. & B. 361.

(*n*) Earl Macclesfield v. Blake, supra; Owen v. Foulks, 9 Ves. 348; West v. Vincent, 12 Ves. 6. Trefusis v. Clinton, 1 V. & B. 361.

(*o*) Molesworth v. Opie, 1 Dick. 289.

(*p*) Vide Annesley v. Ashurst, 3 P. Wms. 282.

Sales by private Contract.

and, it seems, that if an estate directed to be sold before a Master, is sold by private contract, or in any other manner contrary to the order of the Court, and not actually conveyed to the purchaser, the Court will not take notice of the sale, but will direct the estate to be sold before the Master according to the decree (*q*).

In what manner to be effected.

The proper course for an individual to pursue who is desirous of purchasing, by private contract, an estate which has been directed to be sold before the Master to the best purchaser, is, to make a proposal to the vendor, or to the plaintiff in the cause, and to procure him, or some other party in the cause, to make an application to the Court, for an order to refer it to the Master to inquire, and state to the Court whether it will be for the benefit of the parties interested in the estate, that his proposal should be accepted. Sometimes, in cases of this nature, a contract is actually entered into by the parties, subject to the approbation of the Master, before any application is made to the Court (*r*), the advantage of which course appears to be, that a definite arrangement is entered into, subject to the Master's approval, before any expense is incurred, either before the Court or before the Master (*s*).

Where any of the lots are unsold at public sale.

Where an estate has been put up for sale in lots, and either the whole or any of the lots are unsold, the practice is to move the Court for an order, that the plaintiff may be at liberty, with the approbation of the Master, to sell, by private contract, all or any part or parts of the premises which, by the decree, were directed to be sold, which had not then been sold or disposed of, subject to such terms and conditions as the Master shall think fit. The order is drawn up in the terms of the notice, and gives the Master liberty to approve of any such contract or contracts, and to settle the conveyances consequent thereon, in case the parties differ about the same. The plaintiff's Solicitor then enters into a written contract, with any person willing to purchase, 'subject to the approbation of the Master.' When this has been done, a state of facts, stating the contract, is carried into the Master's Of-

(*q*) 1 Sugd. V. & P. 64.
(*r*) 2 Smith, 219.
(*s*) Ibid.

fice, and proceeded upon in the usual manner. This state of facts should be supported by an affidavit of a surveyor, or other competent person, that the terms of the contract are fair, and that it will be beneficial to the estate that the same should be carried into effect.

By private Contract.

If, upon such reference, as above pointed out, the Master reports in favour of the contract, a petition must be presented and served praying that the Master's report may be confirmed, and that the contract may be carried into effect (q). The order made upon this petition usually directs all proper parties to join in and execute the necessary conveyance to the purchaser, or as he shall direct, such conveyance to be settled by the Master in case the parties differ about the same. The title is then investigated, the purchase completed, and the conveyance executed in the same manner as upon a purchase at a sale (r).

Order for.

Sect. VIII.

Master's Report.

A Report is 'a Master's certificate to the Court, how the facts or matters referred to him are or do, upon examination, appear to him, or of something of which it is his duty to inform the Court (s).'

What.

Formerly there appears to have been an opinion prevalent in the profession, that there was a difference between a report and a certificate. In *Jones* v. *Powell* (t), Sir A. Hart, V. C., said, that the difference between a report and a certificate was, that, with respect to the former, the Court had laid it down as an inflexible rule, that before exceptions could be taken to it, objections must be carried in before the Master; but that there was no such rule with respect to the latter. In *Chennell*

Difference between reports and certificates.

(q) 2 Smith, 218.
(r) Ibid.
(s) Prac. Reg. 377.
(t) 1 Sim. 387.

Difference between Reports and Certificates.

v. *Martin* (u), however, the present Vice-Chancellor, Sir L. Shadwell, after a very careful investigation of the subject, came to a different conclusion, and expressed his opinion to be that there is no distinction between a Master's report and a Master's certificate, and that Master's reports and Master's certificates are convertible terms. But, be this as it may, the dispute is merely one respecting terms; for, that there is a practical distinction between some reports or certificates of Masters and others, with regard to the power of taking exceptions to them, without previous objections having been carried in, is indubitable; and the terms 'Master's certificate' and 'Master's report' appear to have been opposed to each other for the purpose of marking the distinction; thus the term *report* has been applied to those reports or certificates that are made by the Master, upon a reference to him by decree or decretal order upon which it is intended to ground a further decree, (and to which, as we shall hereafter see, no exception can be taken, unless a previous objection has been carried in to the draft report,) whilst the term *certificate* has been more commonly applied to those reports or certificates which are intended merely as the foundation for some future interlocutory order or process, and are not intended as the ground of a decree or decretal order (x).

On the present occasion, our observations will be directed to

(u) 4 Sim. 310.

(x) It is to be observed, that, in most of the cases in which a Master is required to certify, it is necessary for him to exercise some degree of judgment or discretion; in such cases the certificate is liable to exception, for the purpose of taking the opinion of the Court as to the correctness of the judgment exercised by the Master; there are, however, other cases in which the Master is required to make a certificate. which do not call for the exercise of any judgment, as in the case of certificates to the Court of the proceedings in his office, which, by the 57th Order of 1828, he is directed to make upon the application of any person, vide ante, p. 794; of the same nature is a certificate of the fact of documents not having been deposited pursuant to an order, which, according to the recent decision of Lord Langdale, in Kemp v. Wade, 2 Keen. 687, (confirming that of Sir A. Hart, V. C., in Jones v. Powell, 1 Sim. 387,) is a certificate which does not admit of exception, vide ante, 811. In fact, certificates of this description are of the same nature as the certificates of any other Officer of the Court, who certifies as to a mere matter of fact belonging to his department, such as the certificate of the Accountant-General as to money not having been paid into Court, or of the Clerk in Court, of documents not having been deposited with him, pursuant to an order of the Court, which certificate,

the reports or certificates made by Masters upon which further decrees or decretal orders are to be founded, and which for the purpose of distinguishing them from reports or certificates of the other description, we shall take the liberty of calling 'reports.'

Separate Reports.

Master's reports are either *general*, or *separate*. General reports embrace the whole matter referred to the Master by a particular decree or order; but a separate report embraces only one distinct object of the reference.

Separate Reports.

Separate reports are made in cases in which it may be inconvenient to the parties to wait till the general report for the opinion of the Master, upon a particular matter before him under the decree. By the old practice of the Court, a separate report could not be made without a special direction in the decree, or special order made upon motion or petition for that purpose, which, however, was granted for asking, at the expense of the party applying (*y*); but, by Lord Lyndhurst's Orders (*z*), it is provided, that in all matters referred to him, the Master shall be at liberty, upon the application of any party interested, to make a separate report or reports, from time to time, as to him shall seem expedient; the costs of such separate reports to be in the discretion of the Court.

Proceedings to obtain.

The party desirous of obtaining a separate report, must take out a warrant to shew cause why a warrant on preparing a draft of such separate report should not be issued, and, if the Master concurs in his view of the subject, the warrant issues and the separate report is prepared accordingly (*a*). If no cause is shewn upon the return of this warrant, a warrant to prepare the report must be issued and served, after which no further evidence can be received as to the matter to be comprised in the separate report (*b*).

The form, manner of preparing, objecting, and excepting to (*c*), and confirming separate reports, are nearly the same as

if wrong in point of fact, must be quashed, upon motion, and not excepted to.

(*y*) 2 Harr. ed. Newl. 478.

(*z*) Ord. 1828, LXX.

(*a*) 2 Smith. 158.

(*b*) Ante, p. 849.

(*c*) Where a party to a suit objects to a separate report, he must except to it in the usual manner, and cannot proceed by petition; Drever v. Maudesley, 7 Sim. 240.

Separate Reports.

upon general reports, the only difference being, that, when it is intended to act upon them, the cause is not set down for hearing upon further directions, as it is upon a general report, but a petition must be presented to the Court, praying such directions as arise out of the separate report.

Certificate of assets.

It is to be observed that, in order to facilitate the progress of a suit instituted for the administration of the assets of a person deceased, it is provided, by the 71st Order (*d*), that where a Master shall make a separate report of debts or legacies, there the Master shall be at liberty to make such certificate as he thinks fit, with respect to the state of the assets, and that every person having an interest shall, thereupon, be at liberty to apply to the Court as he shall be advised. The object of this order, is to enable the parties, when it shall appear that the funds are more than sufficient to satisfy debts and legacies, to make such applications, with regard to the residue of the property, as their interests in it may authorise them to make without waiting till the general report. Thus, in a suit for the administration of assets, if the Master reports that there are debts due by the testator remaining unpaid, and that there is a fund available for the payment of them, application may be made to the Court, by petition, to direct the payment of the debts. So, if the Master reports that there are no debts, the individuals entitled to the residue, if they have been ascertained, may apply to the Court for a distribution of part of the fund. It is, however, to be observed, that such a distribution ought not to be made without retaining a sufficient sum to defray the costs of the suit.

General report.

The Master having obtained all the necessary information to enable him to prepare his general report, which must comprise the conclusions which he has come to upon all the matters referred to him by the decree (*e*), a warrant is, upon his intimation, taken out by the Solicitor conducting the cause underwritten thus—'*To shew cause why the Master should not proceed to prepare his report herein.*' This warrant is

(*d*) Ord. 1828.

(*e*) Beames's Ord.

issued in conformity with the 67th of Lord Lyndhurst's Orders (*f*), by which it is directed, 'that the Master shall not receive further evidence, as to any matter depending before him, after issuing the warrant on preparing his report, but that he shall not issue such warrant without previously requiring the parties to shew cause, why such warrant should not issue.'

Matter of Report.

After the warrant to shew cause has expired, the warrant '*On preparing the Report*' must be issued and served, which operates, as we have seen, by way of bar, to further evidence.

Warrant on preparing.

By one of Lord Coventry's Orders, after stating 'that the Masters of the Court do sometimes, by way of inducement, fill a leaf or two of the beginning of their reports, and sometimes more, with a long and particular recital of the several points of the order of reference,' it is ordered, 'that they shall forbear such iterations, the same appearing sufficiently in the order, and without any other repetition than this, "according to an order, or by the direction of an order, of such a date," shall fall directly into the subject matter of their report, setting down the same clearly, but as briefly as they can, for the ease both of the court and parties (*g*).' This order, however, so far at least, as restricts the recitals of the points of the order, in the commencement of the decree, is generally observed; but it is the practice of the Masters, in their reports, to specify the particular head of each direction contained in the order separately, and then to dispose such direction before he proceeds to report upon another. This method of preparing reports is most useful, since it keeps all the separate subjects of reference distinct from each other, and enables the Master to give his conclusions upon each in a clear and distinct form. And it is to be remarked, that great care is necessary in preparing a report to dispose of all the matters which have been referred, either by findings of the Master upon each section of the decree, or by pointing out what matters of reference have been waived (*h*); and, where a separate report has been made, it will be necessary to allude to it in the general report, specifying the particulars of it, so that the Court may see that all the in-

Recitals in; —of points in decree; —of separate reports.

(*f*) Ord. 1828.
(*g*) Beames's Ord. 81.
(*h*) Bennet, 18.

Matter of Report.

quiries directed by the decree, have been, in some way or other, disposed of by the Master (*i*).

Proceeding where Master goes beyond the decree,

The Master, however, must not go beyond the matters referred to him, and it is laid down in one of Lord Bacon's Orders (*k*), that if a Master reports as to matter which is not referred to him, his report, so far as relates to that matter, is a nullity. It has been decided that, in such a case, the proper course is, not to except to the Master's report, but, before it is confirmed, to apply to the Court, that it may be referred back to the Master to review his report, but that, if no such application is made, and the report should be confirmed, the Court will pay no attention to it, except so far as it is warranted by the decree (*l*).

—or introduces irrelevant matter.

It may be stated, with reference to this part of the subject, that no exceptions will lie to a Master's report, upon the ground that he has introduced irrelevant matter, and that, where exceptions were taken, because a Master had set forth in his report certain parts of an affidavit, and had annexed to his report certain schedules and inventories, which it was insisted upon were irrelevant, and occasioned great and unnecessary expense, the Master of the Rolls, Sir J. Leach, would not permit the exceptions to be argued (*m*).

Difficulties in performing directions of decree, how remedied.

Generally speaking, it is the duty of the Master to meet all the difficulties that may arise in the discharge of his office. In some way or other, he must so provide as that all the accounts and inquiries, directed by the decree, shall be fully taken (*n*); at least it is the Master's duty to go on with them, until he finds a difficulty arising from want of sufficient powers, and then an application must be made to the Court, either by the Master or by the parties, to do that which is necessary in order to supply the defect of his authority (*o*). A motion, however, cannot be made for the purpose of getting the Court to point out to the Master the form in which he is to make his report (*p*).

Master must draw conclusions as to facts,

When the Master is directed to ascertain a fact, he must not content himself with stating the circumstances and leaving

(*i*) Bennett, 18.
(*k*) Beames's Ord. 23.
(*l*) Jenkins v. Briant, 6 Sim. 605.
(*m*) Rufford v. Bishop, 5 Russ. 347.
(*n*) Vide Paynter v. Houston, 3 Mer. 302.
(*o*) Ibid.
(*p*) Agar v. Gurney, 2 Mad. 389.

the Court to draw its own conclusion, but he must draw the conclusion himself; thus, where it was referred to the Master to report whether a particular individual was living or dead, and the Master stated the circumstances, viz., that the individual went to America; that, upon his arrival there, a letter was received from him, and that, since that period, which was fourteen years before the date of the report, he had not been heard of, Lord Eldon, acting upon what he understood to have been Lord Alvanley's course, sent it back to the Master to report whether the individual was dead or not (*q*). It may be mentioned here, that, even when the evidence is such that it is impossible to arrive at any degree of certainty upon it, yet, if it is sufficient to afford a reasonable ground of presumption one way or the other, the Master is bound to find in favour of such presumption (*r*). The Master, however, is not bound to state the inferences of law arising from the facts before him; and where facts are so clearly stated in a report, as necessarily to involve a particular consequence, it is for the Court to act upon the facts so reported; and it would not be a proper ground of exception, that the Master had omitted to point out the consequence (*s*).

Matters of Report,

—and upon presumptions,

—but not conclusions of Law.

It is not, indeed, the general practice, unless in particular cases, for the Master, upon references to inquire into facts, to state the special circumstances of the case in his report, without he is expressly directed to do so. By Lord Clarendon's Orders (*t*), the Masters are not, upon the importunity of Counsel, how eminent soever, or their clients, to return special certificates, unless they are required by the Court to do so, or that their own judgment, in respect of difficulty, leadeth them to it, such kind of certificates, for the most part, occasioning a needless trouble rather than ease to the Court, and certain expense to the suitor. It is to be observed, however, that, under this order, considerable discretion is left to the Master, and that, notwithstanding it, he may, and frequently does, state special circumstances in his report, without any spe-

Special circumstances,

—in discretion of Master.

(*q*) Lee v. Willock, 6 Ves. 605; vide etiam Dixon v. Dixon, 3 Bro. C. C. ed. Belt, 510.

(*r*) Vide Fenner v. Agutter, 1 M. & K. 120.

(*s*) Per Sir C. C. Pepys, M. R., Bick v. Motly, 2 M. & K. 312.

(*t*) Beames's Ord.

Matter of Report.

—Liberty to state given by decree;

—method of stating them.

cific order to warrant it (*u*). It is, nevertheless, frequently the practice, where it is apprehended that particular circumstances may come out upon inquiries before the Master, which may influence the opinion of the Court, when the cause comes on upon further directions, to ask, at the hearing, for a specific direction in the decree or order, that the Master may be at liberty to state special circumstances (*x*), Under such a direction, however, the Master must not set forth the evidence with his opinion upon it, but he should state the matter of fact, for the judgment of the Court, in the same manner as in Courts of Law; —they only state the facts allowed by both sides, in a special verdict, but never meddle with any part of the evidence on either side (*y*).

Reference to evidence.

Schedules.

But although the Master does not, unless under special circumstances, detail the evidence upon which he proceeds in making his report, yet he generally refers to it, either in the body of his report or in a schedule annexed to it. When he reports upon accounts, he generally states the result of the accounts in the body of the report, and refers to schedules as to the particular items. These schedules must be annexed to the report and filed with it, and it will not be sufficient that they should be entered in a book kept in the Master's Office, in the same manner as the accounts of Receivers (*z*).

Draft report.

When the Master has prepared his report, an intimation of his having done so is given to the Solicitor for the party conducting the cause, (who has, generally, bespoken a copy of the draft report,) that the draft report is ready. Any party, however, may apply to the Master to make his report (*a*), and when the draft is prepared, a warrant must be taken out and served upon all parties *active* in the suit, underwritten—'*the*

(*u*) Vide anon. 2 Atk. 620; Champernowne v. Scott, 4 Mad. 209.

(*x*) Seton on Dec. 24.

(*y*) Duchess of Marlborough v. Wheat, 1 Atk. 454.

(*z*) Smith v. Smith, 2 Dick. 789. For the convenience, however, of suitors wishing to refer to accounts taken in the Master's Office, it is provided, by the 62nd Order, that all such accounts, when passed and settled by the Master, shall be entered in a book to be kept for that purpose in the Master's Office, as is now the practice with respect to Receiver's accounts, and with proper indexes, in order to be referred to as occasion may require, Ord. 1828, LXII.

(*a*) Turn. & V. 428.

Master has prepared the draft of his general [or separate] *report* '(*b*). This is done for the purpose of informing the parties that the report is ready.

Draft Report.

Upon the service of this warrant, the parties requiring it must procure, from the Master's Clerk, a copy of the draft report, or of such part of it as affects their interests (*c*). And the party conducting the cause must take out and serve, successively, warrants '*to proceed upon*' and '*to settle*' the draft report (*d*).

Copies, by whom to be taken.

Warrant to settle.

Upon attending the warrant, to settle the draft report, the Solicitors for the several parties should suggest to the Master such alterations as in their judgment they may think proper. Formerly, the Master might receive evidence upon any point before him, up to the period of settling the draft of his report (*e*), but could not receive it after the report had been finally settled, but, as we have seen, under the 67th of Lord Lyndhurst's Orders, the Master cannot receive further evidence as to any matter before him, after issuing the warrant 'on preparing his report' (*f*).

Settlement of draft report.

When all the alterations and suggestions of the parties have been submitted to the Master and disposed of, the Master finally settles the draft of his report, from which the Master's Clerk makes a transcript or engrossment upon paper, which must be carefully examined by the Solicitor for the party taking the same, and compared with the draft as settled by the Master (*g*). After this has been done, another warrant must be taken out and served underwritten—'*at which time the Master will sign his general* [or separate] *report herein*.' This is called the warrant on signing the report, and must be served upon the parties so as to give them three clear days between the service and the day for

Transcript of draft report.

Warrant on signing.

Service of.

(*b*) Turn. & V. 428.

(*c*) Formerly, no party could attend the Master upon the draft report who had not taken a copy of it; but this is now altered, vide ante, p. 806.

(*d*) 1 Turn. and V. 428, these warrants may be taken out by any of the parties, but they are usually taken out by the plaintiff's Solicitor, unless the conduct of the cause has been taken from him, vide ante, p. 792.

(*e*) Vide Thompson v. Lambe, 7 Ves. 587.; Beames's Ord. 258. and the cases there cited, *notis*.

(*f*) Ante, p. 849.

(*g*) 1 Turn. & V. 429.

Draft Report.

attendance, that is three days, of which neither the day of service nor the day of attendance is reckoned as one (*h*); the object of this delay being to afford the parties time to bring in objections to the draft report, if they shall be so advised. If, upon the return of this warrant, no objections are brought in, or time for bringing in objections applied for and allowed, the Master proceeds to sign the transcript, and then the report is in a complete state and ready for filing (*i*).

Signing.

Objections to draft report.

The object of allowing the interval of three clear days, between the service of the warrant on 'signing the report,' and the time appointed for the attendance upon such warrant, is, as has been stated, to allow parties who are dissatisfied with the Master's judgment, an opportunity of stating their objections to it in writing. The reason for the adoption of this proceeding, is thus stated by Lord Chief Baron Gilbert (*k*)—'The antient rule was, that the party should never except, but where he had first objected to the draft of the report before the Master; and, where there was no objection brought in, it was allowed as good cause to discharge the exception; and it were to be wished that this good rule was strictly followed, since, if the party had objected, he might have shewed the Master his error, and the report would have been altered in that particular, and never troubled the Court. Whereas it often happens, that the party will conceal some material objection and keep it *in petto* from the Master; and when this comes on by way of exception, it makes a variance in the report, as it might have done if it had been faithfully disclosed and laid before the Master.'

exceptions unless there has been objections.

The rule mentioned by the Lord Chief Baron, was promulgated by Lord Keeper North, in 1683 (*l*), and is in fact, with little variation, the rule of the Court at the present time; the

(*h*) Ante, p. 798. This is sometimes termed a four-day warrant, reckoning the day of attendance as one of the days,

(*i*) 1 Turn. & V. 428.

(*k*) For. Rom. 167.

(*l*) Beames's Ord. 259.

practice of the Court requiring that, in all cases of reference to a Master, under a decree or decretal order, upon his report, as to which a further decree or decretal order is to be founded, no party is at liberty, without a special order, to except to the report, unless he has, previously to the Master's signing the report, carried in objections, in writing, to the draft report, specifying the points in which he considers the Master's report to be wrong (*k*).

Objections to Draft.

Objections to a draft report are generally, though not necessarily, drawn by Counsel, but are not signed by him; and as they are to serve as the foundation of future exceptions, they are generally the same in form and substance as the exceptions proposed to be taken.

Form of.

Although the objections ought, in strictness, to be taken in the period between the service of the warrant upon the signing the draft report and the return of such warrant, yet the Master will, upon a proper case being submitted to him, allow further time for bringing in the objections (*l*).

Time of bringing in; —further time.

To obtain such further time, a warrant should be taken out and served before the return of the warrant to sign the report, and, on the attendance upon such warrant, a reasonable time, commensurate with the specialties of the case, will be given, by the Master, to prepare and bring in the objection (*m*).

—how procured.

If a person interested in the report, though not a party to the suit, is dissatisfied with it, he must leave objections to the draft as a preliminary step to putting himself in a situation to take exceptions; thus, creditors and other persons coming in under decrees, and who have had their claims allowed, must, if they mean to except to the report, carry in their objection to the draft in the same manner as parties to the record.

Objections may be left by persons not parties,

So, also, persons who have carried in claims as creditors or next of kin, under decrees, but have had their claims disallowed, ought also, if they intend to dispute the Master's find-

although their claims have been rejected.

(*k*) Pennington v. Lord Muncaster, 1 Mad. 555.

(*l*) 1 Turn. & V. 430.

(*m*) Ibid.

Objections to Draft.

ing, to be prepared with objections to the draft report in order to gain a right to except to it (*n*).

Warrants on.

It is to be observed, that the object of requiring a party to deliver objections before he can except to the report, is that the Master may have an opportunity of reconsidering his opinion (*o*), and that, when they are left, the usual warrants 'on leaving' and 'to proceed' should be served on the parties.

Proceeding upon.

If, after considering the objections, the Master retains his original opinion, he signs the report as it stands. If he changes his opinion, he alters the draft of his report accordingly, after which a fresh warrant 'on signing' must be served, in order to afford the other party an opportunity of carrying in fresh objections to the altered draft.

Filing and Confirmation of Report.

The Master's report having been signed, it should be forthwith filed in the Report Office, and an office copy thereof taken by the party filing it (*p*). By an old order (*q*), this should be done within four days after the signature, but it is considered sufficient if it be filed at any time before any proceedings are taken or order made thereon (*r*).

After the report has been filed, it must be duly confirmed before any step can be taken upon it. It is to be observed, that, those reports only, require confirmation which come within the description of 'reports strictly so called,' that is to say, those upon which it is intended to found a decree or decretal order. If it be merely a report which comes more properly under the denomination of a 'certificate' made upon or in consequence of an interlocutory application by motion, which is intended as a foundation for issuing the process of the Court, or for another interlocutory order, it requires no confirmation. So, also, if it be merely a report or certificate of having computed

What reports require confirmation.

Certificates do not.

(*n*) Vide Walker v. Wingfield, Reg. Lib. 1809, B. fo. 10; and Ker v. Cloberry, Reg. Lib. 1812, A. 734.

(*o*) Bowker v. Nickson, 3 Mad. 439.

(*p*) Bennet, 22.

(*q*) Beames's Ord. 292.

(*r*) Vide ante, p. 811 n. (b).

Confirmation of.

subsequent interest, or of having apportioned a fund between parties, upon principles and in the proportions declared by the Court in a decree or decretal order, but upon which no further order is to be made.

These certificates require no confirmation by the Court, but are complete as soon as they are filed (*s*); though they are liable to exceptions, if any of the parties are dissatisfied with the Master's determination.

Although made in proceedings under decrees.

It may be mentioned here that there are certain certificates which, although they are made by the Master, in the course of proceedings under decrees and decretal orders, are, nevertheless, complete as soon as they are filed, and require no confirmation.

The certificates alluded to are those which are made by the Master, pending the prosecution of a reference before him, for the purpose of informing the Court of his having performed certain interlocutory acts which are necessary to enable him to fulfil the duty imposed upon him, but which do not form the principal object of the decree under which he is acting. Of this nature are certificates given by the Master of having approved of a conveyance, or settled interrogatories for the examination of parties, or of his having ordered the production of documents, pursuant to the decree, and that the documents ordered to be produced were either produced or not produced before him. These certificates, although liable to exception, do not require confirmation (*t*), and, in fact, they partake more of the nature of certificates, upon matters referred to the Master, by interlocutory application in the course of the cause, than of reports; and, although the directions in the decree, by which they are autho-

(*s*) 2 Smith, 358.

(*t*) In Scott v Livesey, 2 S. & S. 300; the Vice-Chancellor, Sir J. Leach, is reported to have said, that whenever exceptions would lie to a Master's report, it must be regularly confirmed before any order can be made upon it; this, however, must be a mistake, as the only report of this nature which requires confirmation, is that of a person being the purchaser of a lot at a sale before the Master, (ante, p. 909,) with respect to which it is to be observed, that the object of requiring this report to be confirmed is, not to enable the parties to bring the decision of the Master under the review of the Court, but to afford time between the service of the order *nisi*, and the absolute confirmation of the report, to others to come in and open the biddings, so as to secure the sale of the estate to the best possible advantage, ante, p. 910.

Confirmation of.

rised, are now generally introduced into the decree itself, it is probable that they formed, originally, the subject of specific orders made upon special application, in the same manner that inquiries into the sufficiency of examinations or into scandal and impertinence, in any of the proceedings before the Master, were originally directed by order upon motion, but may now, under the General Orders of the Court (*u*), be entered into by the Master without any specific direction and are certified by the Master accordingly.

Where ordered upon petition,

It may also be mentioned here, that there is also a distinction between the manner of confirming some reports and that of confirming others. Those reports which are founded on decrees or decretal orders, must be confirmed by order made upon motion, whilst those reports which are the consequence of orders made upon petition must be confirmed by petition. Of this description are, reports as to the propriety of granting leases of property under the control of the Court, or as to the approval of contracts for the purchase of property with funds in Court. Of the same nature, also, are reports of the allowance of maintenance or guardians for infants, where the application for the maintenance or guardians has been made to the Court in the form of a summary petition, though the form of confirming such report would be different, if the order for the approval of the maintenance, &c., should be made upon decree (*y*).

—praying consequential directions.

Reports of this description must, as has been stated, be confirmed by petition, which generally prays, besides the confirmation of the report, such consequential directions as arise out of it. On hearing these petitions, the Court will take into consideration any objections which may arise upon the report, provided they are sufficiently raised by it to enable the Court

(*u*) Orders, 1828, ante, p. 851.

(*y*) Vide Cavendish v. Mercer, 5 Ves. 195, notis. It is to be observed, that, in the principal case Greenwell v. Greenwell, ib. 194, Lord Loughborough is reported to have noticed, that, in Cavendish v. Mercer, the report was confirmed upon motion, and to have observed, that the practice of confirming these reports, upon motion, is irregular;—perhaps his Lordship did not advert to the distinction above pointed out, and to the fact, that, in Cavendish v. Mercer, the direction for the inquiry as to maintenance was made by decree, whereas, in general, applications for maintenance, &c., are made by petition in a summary way.

to dispose of them. In some cases, however, it is necessary, in order to raise the point, to present a petition praying that the Master may review his report, which is the only mode of excepting to this class of reports (*z*).

Confirmation of.

The first step towards confirming a Master's report, by motion, is to procure an order for confirming it *nisi*, that is, an order 'that the report and all the matters and things therein contained, do stand ratified and confirmed, &c., unless the defendant, having notice thereof, shall, within eight days after having such notice, shew unto the Court good cause to the contrary' (*a*).

Upon motion. Order *nisi*.

This order may be obtained, by motion of course, or by petion at the Rolls (*b*), by any of the parties, though it is usually taken by the plaintiff or party taking the report, though, it seems, as a preliminary step to the party, who does not take the report, proceeding to confirm it; he should give the party, taking the report, notice, that, unless he moves to confirm the report within a given time, he shall do it (*c*). It is said, also, that, where a Master makes a separate report of a creditor's claim, the creditor may obtain the order to confirm the report (*d*).

how obtained, —by a defendant, —by a creditor;

It seems, that the circumstance of obtaining an order to confirm a Master's report *nisi*, does not preclude the party taking it from afterwards excepting to the report; thus it has been held that if a plaintiff moves to confirm a report *nisi*, and the defendant shews for cause that he has taken exceptions to the report, the plaintiff too may except to the report, notwithstanding his motion (*e*); and, in fact, although the party to take the report is not satisfied with it, he must, nevertheless, procure and serve the order *nisi* for confirming the report, such proceeding being necessary by way of notice to all the other parties to file their exceptions, if they intend to object to the report, otherwise the report will remain open for the other parties to except to it even after the exceptions have been heard (*f*).

does not prevent party obtaining it from excepting; must be obtained before excepting.

(*z*) 2 Smith, 359.
(*a*) Hand. 169.
(*b*) Ord. XXI. 1828.
(*c*) 2 Smith, 361; and Shirley v. Earl Ferrers, MS. cited ibid.
(*d*) Gibbons v. Caunt, MS. cited ibid.
(*e*) Anon. Mos. 305.
(*f*) 2 Smith, 364.

Confirmation of.

In a recent case (*g*), after the Master had made his report, the plaintiff excepted to so much of it as allowed certain payments made by the defendant, but neglected to obtain the usual order to confirm the report *nisi*, before filing his exceptions. The exceptions came on to be argued and were allowed, and it was referred back to the Master to review his report, upon which the Master made his further report, and the plaintiff obtained an order *nisi* to confirm it. As no order *nisi* to confirm the first report had been obtained, it was considered necessary also to confirm so much of the original report as had not been excepted to, and the plaintiff applied, as of course, for an order *nisi* for that purpose, which the Registrar declined to draw up without the sanction of the Court; whereupon the plaintiff made a motion, at the Rolls, for an order *nisi* to confirm so much of the Master's report as the plaintiff had not excepted to, and the order was made in those terms.

Service of,

Formerly it was necessary to serve the order *nisi* upon the parties *personally*, unless they amounted to a certain number or were abroad; but, by the 21st Order (*h*), it is provided, that service upon the Clerk in Court of any party shall be deemed good service upon such party.

—need not be personal,

nor upon creditors, &c.

It may be mentioned here, that although creditors who have come in before the Master and have had their claims allowed, are frequently most materially interested in the report, it is not usual to serve them with the order for confirming it *nisi*; and that, of course, where persons have come in as creditors, but have not succeeded in establishing their claims, they are never served with such order (*i*).

Order absolute, when obtained.

A copy of the order *nisi* having been served at the seats of the several Clerks in Court for the different parties, an affidavit of such service must be made and filed, and then, if no cause is shewn within eight days, one inclusive and the other exclusive, after service of the order, or before the motion

(*g*) Robinson v. Wood, Rolls, 16 Dec. 1839, ex relatione Faber.

(*h*) Ord. 1828.

(*i*) By the 44th Order, of 1828, the London Solicitor of a person not a party, who has appeared either before the Court or a Master, may be served with any order or process of the Court; ante, p. 804.

is made to confirm the report absolute, the party is entitled to move as of course, *at the first motion day* after the expiration of those eight days, to make the order *nisi* absolute (*k*).

Confirmation of.

In reckoning the eight days after service of an order to confirm a report *nisi*, within which a party is at liberty to shew cause, it is usual to reckon the day of service as one (*l*), so that the eighth day after the day of service is excluded from the calculation, unless the day preceding it happens to be a holiday (*m*), or a Sunday (*n*), in which case it appears that the party is entitled to the whole of that day for shewing cause. It is to be remarked, however, that it is only the circumstance of the Sunday or holiday occurring *on the last day*, that can be considered as entitling the party to another day for shewing cause against confirming the report; if it occurs in the intermediate time, the case will be otherwise (*o*).

Computation of the eight days.

Where the last day is Sunday or a holiday.

The usual cause shewn against making the order *nisi* for confirming the Master's report absolute, is the filing of exceptions to the report, and the setting of them down to be argued (*p*), but it is to be observed that there must be an order for setting the exceptions down for argument actually entered

Of shewing exceptions for

Order for setting down must be served.

(*k*) 2 Smith, 362.

(*l*) Manners v. Bryan, 5 Sim. 147; 1 M. & K. 453. S. C.

(*m*) Ibid.

(*n*) Milburn v. Lyster, 5 Sim. 565. It is to be observed that, in this case, there appears to have been a mistake as to the time from which the eight days is to be reckoned; for if, as stated in Manners v. Bryan, (ubi supra,) the day of service is to be reckoned as one of the days, the eight days expired (the order *nisi* having been served on the 17th,) on the 24th; so that the circumstance of the 25th being a Sunday, was, in fact, of no importance, as the plaintiff's time for setting down his exceptions had expired before that day. It is to be remarked, also, that there is much ambiguity in the result of Manners v. Bryan, as stated in the different reports. In the report in 5 Sim. 147, the real ground of the Vice-Chancellor's judgment, can only be collected, by inference, from the fact stated that the order for setting down the exceptions was not passed and entered till the 23rd. In the report of the same case, upon appeal before the Lord Chancellor, 1 M. & K. 453, although his lordship is represented to have acknowledged the rule, as laid down by the Vice-Chancellor, that the day of service is always reckoned as one of the eight days, it appears, from the report, to have been considered that the plaintiff might have entered and served his order for setting down his exceptions on the last of the eight days, although there was a physical impossibility of his so doing, by reason of all the offices being closed.

(*o*) Manners v. Bryan, ubi supra.

(*p*) Gildart v. Moss, 4 Ves. 617.

Confirmation of.

and served, and that the mere filing of exceptions and paying the deposit will not be sufficient (*q*).

Order to review report.

An order to review the report, which is sometimes, though very rarely, granted upon application after the order *nisi*, may, also, be shewn as cause against confirming it absolute.

Time for shewing cause, how enlarged.

If, for any reason, a party is desirous of enlarging the time for confirming the report absolutely, he should make a special application to the Court by motion (*r*).

On what day the motion to confirm absolute is to be made.

It is to be noticed, that, in term time, a motion to confirm a Master's report absolutely, may be made on any day of the Court sitting, but that, in vacation time, it can only be made at one of the general seals; and where the time for shewing cause does not expire till after the first day of the seal, the party wishing to confirm the report must wait till the next seal day; he cannot move at that seal though it last several days, as the subsequent days are only a continuance of the first day (*s*). So if the time for shewing cause expired only on the last day of term, the motion cannot be made at the Rolls on the morning after the last day of term, the sitting of the Master of the Rolls on that day being considered merely as a continuation of the last day of term (*t*); and as a party cannot move to confirm a report absolute before a general seal day, where the time for shewing cause expires between the seals, so he cannot obtain special leave to make such motion in the intermediate time (*u*).

Cannot be by petition.

The application for the order to confirm the Master's report absolute, must be by motion, and cannot be by petition at the Rolls, the 21st Order (*x*), which authorizes the granting the order *nisi* upon petition, not extending to the order absolute. It must be supported by an affidavit of service of the order *nisi*, and by the Registrar's certificate of no cause having been shewn. The order confirming a report absolute requires no service (*y*).

Order need not be served.

(*q*) Gildart v. Moss, 4 Ves. 617; vide etiam Hall v. Mulliner, 2 Dick. 604; Abel v. Nodes, ib. 730; Mole v. Smith, 1 J. & W. 670.

(*r*) Vide Hand. 169.

(*s*) Anon. 1 P. Wms. 523.

(*t*) Ibid.

(*u*) Coffin v. Cooper, 11 Ves. 600.

(*x*) Ord. 1828.

(*y*) 2 Smith, 364.

Confirmation of consent.

It may be mentioned, in this place, that, after a report has been filed, the adverse party may give an authority to his Counsel to consent that such report be absolutely confirmed, and on such Counsel consenting, the Court will so order it, but, without such consent, the Court will only order it to be confirmed *unless cause*, &c. (z).

Exceptions to Report.

What reports may be excepted to.

It is hoped that, from the statement already made, the practitioner will be able to collect what reports and certificates of Masters may be the subject of exceptions, and that the following recapitulation will be sufficient, in this place, to remind him, 1st., that all reports or certificates of Masters, whether they properly come within the description of reports or of certificates which are made in pursuance of decrees or orders pronounced at a hearing of the cause, or of an interlocutory motion, are liable to be excepted to by parties conceiving themselves aggrieved by them (a), with the exception only of those certificates which are in the nature of certificates given by other Officers of the Court, as to matters within their respective departments, such as certificates of the nonproduction of documents pursuant to a decree or order, and certificates of the state of the proceedings in his office under the 57th Order of 1828 (b).

What reports may not be excepted to.

2ndly. That those reports, which are made by the Master in pursuance of orders pronounced by the Court upon *petition* (c), are not liable to exception—they can only be objected to at the hearing of the petition to confirm them, or upon a petition presented for the express purpose of having it referred back to the Master to review his report; to which may be added the Master's certificate upon the taxation of costs, the regular method of objecting to which is not by exceptions,

(z) 2 Harr. ed. Newl. 482.

(a) Chennell v. Martin, 4 Sim. 340.

(b) Ante, 931.

(c) This does not include orders made upon petitions of course at the Rolls.

Exceptions.

but by petition, stating the items meant to be excepted to (*d*)

Certificates may be excepted to without objections.

3rdly. That those certificates or reports, which are more properly designated certificates, and which do not require any confirmation, may be excepted to without any previous objections being carried in to the draft of the report (*e*).

Secus reports properly so called

4thly. That all those reports or certificates which are more properly designated as reports, and which do require confirmation, cannot be excepted to without previous objections being carried in to the draft report in the Master's Office (*f*).

Exceptions do not lie to finding as to matters of law,

It may be mentioned here, that where the Master, by his report, states all the facts correctly, but is mistaken as to the legal consequences of those facts, it is not necessary for the party dissatisfied with the Master's finding, to except to the report, as the question decided by the Master may be opened upon further directions without exceptions (*g*). So where facts are so clearly stated in a report as necessarily to involve a particular consequence, it is for the Court to act upon the facts so reported, and it will not be a proper ground of exception that the Master has omitted to point out the consequence (*h*).

—nor because Master has omitted to draw particular consequences from the facts stated,

—nor where it has been referred to Master to certify his opinion;

It has also been held, that, in case of a report under a reference for the Master to inquire and certify his opinion, exceptions are not to be taken to the report, but it is to be brought before the Court upon the report to determine (*i*).

Permitted though there has been no objections to draft.

With respect to the class of reports which require confirmation, it is to be observed, that though the rule is generally very strictly adhered to, of not permitting exceptions to be filed where there have been no previous objections; there are, nevertheless,

(*d*) Pitt v. Mackreth, 3 Bro. C. C. 321; et vide Lucas v. Temple, 9 Ves. 299;; overruling a distinction taken in Holbecke v. Sylvester, 6 Ves. 417, vide etiam Purcell v. M'Namara, 12 Ves 170; Fenton v. Crickett, 3 Mad. 496.—N. B. the petition usually prays that the party presenting it may be at liberty to except, Pitt v. Mackreth, ubi supra, and the Court, upon hearing the petition, usually refers it to the Master to review his report, without imposing upon the applicant the necessity of filing exceptions.

(*e*) Ante, p. 944.

(*f*) Ibid.

(*g*) Adams v. Claxton, 6 Ves. 226.

(*h*) Bick v. Motly, 2 M. & K. 312

(*i*) Neal v. Billing, 1 Dick, 93.

cases in which the Court will permit a departure from it. Thus, if it has been owing to accident or surprise that the objections have not been carried in, as where the Clerk in Court omitted to give the Solicitor notice of the warrant to sign the report, the Court will permit exceptions to be filed (k). So where the Solicitor swore, by his affidavit, that he had neglected to carry in objections, because he was not aware that it was necessary to take objections to the report in the draft, in order to enable him, on behalf of his clients, to file exceptions, an order to permit his filing exceptions was made, although the Master's report had been confirmed *nisi* (l). In *Vallence* v. *Weldon* (m), upon an application to take exceptions to a report, although no objections had been carried in to the draft, Sir Thomas Clarke, M. R., referred it to the Master to review his report, in order that the parties might have an opportunity of taking exceptions to it.

Exceptions.

By whom they may be taken,

All parties to the record who are interested in the matter in question may take exceptions to the report, and, where there are several sets of parties, appearing by different Solicitors, they may, if they are not disposed to join, each take exceptions, although their grounds of exception are the same (nn). Creditors too, who have established their claims before the Master, are, as we have seen (n), permitted to except to the report, although not parties to the suit; so, also, are creditors who have preferred their claims, but have been rejected by the Master (o); it is necessary, however, before they do so, that they should obtain the permission of the Court, which they may do upon motion of course, or petition at the Rolls (p).

—by parties,

—by persons not parties;

—but previous order necessary.

The same thing may be done by persons, claiming as next of kin, whose claims have been disallowed by the Master (q), or by a purchaser under a decree for sale in the Master's Office (r).

But although in the case of persons claiming as creditors,

Where they have omitted to carry in objections a special order is necessary.

(k) Bowker v. Nickson, 3 Mad. 439.

(l) Pennington v. Lord Muncaster, 1 Mad. 155.

(m) 1 Dick. 290; 1 Mad. 340, notis. S. C.

(nn) Trezevant v. Fraser, MS. 11 Jan. 1836.

(n) Ante, p. 943; Wilson v. Wilson, 2 Moll. 328.

(o) Ante, p. 943

(p) 2 Smith, 370.

(q) Walker v. Wingfield, Reg. Lib. 1809, B. fo. 10, cited ib.

(r) Ker v. Cloberry, Reg. Lib. 1812, A. 734, cited ib.

Exceptions.

or as next of kin, or of purchasers, liberty to except to the Master's report may be granted, upon petition or motion of course, the case is not so with respect to persons who, whether parties to the suit or claimants under the decree, have omitted to carry in objections to the draft; such persons, if they wish for the indulgence of the Court, must obtain it by means of a special application, supported by affidavit, accounting for their omission in not complying with the rules of the Court; and, from what occurred in *Vallence* v. *Weldon* (s), it may be collected, that such application should be made by motion and not by petition.

Persons who have obtained leave to attend proceedings.

It may be mentioned here, that, in *Taylor* v. *D'Egville* (t), it was held by Sir L. Shadwell, V. C., that persons who were not parties to the suit, but who had obtained leave to attend the proceedings in the Master's Office, could not except to the report, unless they presented their petition stating their objections, and praying for leave to except.

When to be taken,

—where report does not require confirmation.

Exceptions to a Master's report should not be taken till the report has been filed (u); afterwards, where the report is one which does not require confirmation, no time should be lost in filing them, and serving the order to set them down, before any step is taken upon the report; otherwise the excepting party may be precluded from the benefit of his exceptions; thus, in cases of exceptions to reports on the insufficiency of answers, care should be taken to file the exceptions to the Master's report and to get the exceptions set down with the usual formalities, before a subpœna has been issued for costs, or before the defendant puts in a further answer (x). So, in the case of exceptions to a Master's report on impertinence, the exceptions ought to be filed, and the order to set them down served, before the impertinent matter has been expunged (y). In like manner, in all cases where the report of the Master is to serve as the foundation for a Serjeant at Arms, or for a commitment, or other process of contempt, the exceptions to the Master's report should be filed, and the order for setting them down served, before the order *nisi* for issuing the process has

(s) 1 Dick. 290; Ambl. 126, S. C.

(t) 7 Sim. 445.

(u) 2 Smith, 370.

(x) Ante, p. 329.

(y) Ante, vol. 1, 458.

Exceptions.

been made absolute; as, after an order *nisi* for a Serjeant at Arms, or for a commitment, or other process, has been made absolute, the party against whom it has been issued being in contempt, will not be in a situation to obtain an order for setting down the exceptions; or, if he does obtain such an order, will be liable to have it discharged. It is to be recollected that the rule which has been before laid down (*z*), with regard to those exceptions to a Master's report which require confirmation, applies equally to exceptions to reports which do not require it; and that the only effectual way, in the latter case, as well as in the former, to render exceptions available to suspend further proceedings upon the report, is, not only to file the exceptions and pay the deposit, but to obtain an order to set them down, and serve such order upon the other party, it being by means of such service only, that the fact of the exceptions having been filed, is regularly brought to the knowledge of the party procuring the report.

Where it does require confirmation.

With respect to exceptions to reports that require confirmation, the proper time for filing exceptions to them, is, after service of the order for confirming them *nisi*, and before such order is made absolute; and it is to be recollected, that, even where the party who intends to except, is the person taking the report and having the conduct of the cause, it is right that he should, before filing his exceptions, obtain and serve the order for confirming the report *nisi*, and that his right to except will not be thereby prejudiced (*a*).

After report has been confirmed absolute,

But although the Court is, in general, very strict in requiring, that parties intending to except to a Master's report should file their exceptions, and serve the order for setting them down, before the report is made absolute, and will even order exceptions filed afterwards, to be taken off the file (*b*), there are cases in which, under particular circumstances, it will relax from its rule, and permit exceptions to be filed after the report has been absolutely confirmed (*c*).

(*z*) Ante, p. 949.

(*a*) Ante, p. 947.

(*b*) Sterling v. Thompson, Coop. 271.

(*c*) Vide Allen v. Allen, 1 Dick. 362; 1 Swanst. 157 n. S. C.; Hawkins v. Day, 1 Ves. 189; 1 Swanst. 158. S. C.; and Belt's Supp. to Ves., 106. S. C.; vide etiam Montara v. Hall, L. J. vol. 4, N. S. 53.

Exceptions.

—rarely permitted.

The cases, however, where this has been done, are very rare, and the granting or not granting liberty to except after the report has been confirmed, is entirely discretionary in the Court (*d*).

Second exceptions allowed after first disposed of,

It may be mentioned here, that, in *Hawkins* v. *Day* (*e*), an application was made to Lord Hardwicke, for liberty to the party to take exceptions to a Master's report, notwithstanding another set of exceptions had been taken and disposed of upon argument, and the report confirmed. It appeared, that there had been great neglect of the interest of the petitioners, who were the representatives of an accounting party and resided at Bristol, and employed a Solicitor at Bristol, who again employed an agent in London to defend their cause, and that it was not until after the first exceptions had been heard and disposed of, that the applicants got a sight of the Master's report, and of such schedules thereto as related to the claim against them, and then found, to their very great surprise, many plain mistakes therein to their prejudice which were not discovered or excepted to; under these circumstances, the Lord Chancellor was of opinion that it was reasonable that the petitioners should, upon certain conditions, which he prescribed, have liberty to re-argue the exceptions formerly taken to the Master's report, and to take new exceptions relating to the matters complained of in their petition, to come on to be argued at the same time. The result of this decision, however, was that, upon the Counsel for the plaintiffs desiring, for the sake of despatch, to avoid such circuity and the delay and expense which would be occasioned thereby, his Lordship ordered that, upon the applicants giving their own recognizance, within a fortnight from that time, in the penalty of £2000, with a condition to pay such sum of money, if any, as should be found due from them, upon the balance of the account directed by the decree to such parties to whom the same should be found due, together with interest for the same from that day, and paying to the plaintiffs such costs as they had been put to by taking out the Master's last report, so far as the same related to the account of the per-

—but under very special circumstances.

(*d*) Vide Earl of Bath v. Earl of Bradford, 2 Ves. 587.

(*e*) 1 Ves. 189; vide the report of the same case in 1 Swanst. 153 n.

Exceptions.

sonal estate, and the administration thereof, and the costs subsequent thereto, so far as related, &c., and the costs of that application to the Court, and within a week after the taxation or settling thereof; that the confirmation of the said report should be so far opened as related to the account of the said personal estate and administration thereof, and that it should be referred back to the Master to review that part of the said report (*f*).

Form of exceptions,

The form of exceptions to a Master's report is in all cases nearly the same; the nature of them, in cases of insufficiency or impertinence, has been already pointed out (*g*), and the same rules are generally applicable to all exceptions to reports. It is important to recollect, that where one general exception is taken to a report including several distinct matters, and the report appears right in any one instance, the exception will be overruled (*h*).

to report, as to title.

It seems that, formerly, the method of taking exceptions to the Master's report, upon a reference as to title, was generally 'for that the Master had certified that the plaintiff could make a good title, whereas he ought to have certified that he could not make a good title,' but that the present course is, to state the ground of objection to the title, in the exceptions. Such course, however, has only been adopted for convenience, and that if there is any substantial objection to the title which is not stated in the exception, the party is not precluded from arguing it (*i*).

Must be in conformity with objection.

When the exceptions are taken, after objections have been carried in to the draft report and disallowed, the exceptions should be in conformity with the objections, and, though different in form, they must be substantially the same (*k*). The practice, generally, is to prepare the objections in the form of the intended exceptions, and to convert them afterwards into exceptions.

Signature of Counsel.

Exceptions are usually prepared and must be signed by Counsel.

(*f*) Vide Belt's Supp. to Ves. 106. S. C.

(*g*) Ante, p. 330.

(*h*) Hodges v. Salomons, 1 Cox. 249.

(*i*) Abell v. Heathcote, 4 Bro. C. C. 278-283.

(*k*) 2 Smith, 372.

Exceptions. Filing and setting down.

The method of filing and setting down exceptions to a Master's report, and of paying the deposit, has been already described in treating of exceptions to a Master's report upon the insufficiency of an answer (*l*). It is to be recollected, that in order to render exceptions available to suspend the confirmation of the report (*ll*), or any proceeding upon a certificate (*lll*), the order for setting them down should be entered and served.

Before what Judge.

By the Orders of the 5th May, 1837 (*m*), every exception or set of exceptions taken to any report, made by a Master, in pursuance of a decree or order of reference, (not being an order obtained as of course,) made by the Lord Chancellor or the Vice-Chancellor, must be set down to be heard before the Lord Chancellor, and shall not, without special order of the Lord Chancellor, be set down to be heard before the Master of the Rolls; and, by the same Orders (*n*), it is directed, that every exception, &c., taken to any report, made pursuant to a decree or order of reference, (not being an order obtained as of course,) made by the Master of the Rolls, must be set down to be heard before the Master of the Rolls, and shall not otherwise than for the purpose of rehearing, be set down to be heard before the Lord Chancellor.

At the same time with further directions.

A plaintiff may set down exceptions to the report at the same time that he sets down the cause to be heard upon further directions (*o*).

Argument.

When exceptions to a report have been set down, they are argued and disposed of in the manner already described (*p*); it may be mentioned, however, that the Counsel of all parties interested in the report, are allowed to be heard in support of the report, and against the allowance of the exceptions; but only the exceptant's Counsel can be heard in support of the exceptions (*q*). It may also be mentioned, that, upon hearing exceptions to a Master's report, you cannot read affidavits made subsequent to it (*r*), or any evidence which was not before the Master when he made the report. In *Ridifer* v.

—No evidence read upon —but what is before Master.

(*l*) Ante, p. 331.
(*ll*) Ante, p. 9(?).
(*lll*) Ibid. 954.
(*m*) Ord. VI.
(*n*) Ord. X.
(*o*) Yeo v. Frere, 5 Ves. 424.
(*p*) Ante, p. 332.
(*q*) 2 Smith, 376.
(*r*) Davis v. Davis, 2 Atk. 21.

O'Brien (*t*), where it was admitted, on the argument of the exceptions, that there was no sufficient evidence before the Master to warrant a different finding by the Master, but it was contended, that additional evidence, which had been since procured, was admissible to shew that the report was incorrect; the Vice-Chancellor would not permit any argument upon the evidence which was not before the Master, and, on overruling the exception, refused to direct the Master to receive the additional evidence, but allowed the matter to go back to the Master, with an intimation, that, if he refused to receive the additional evidence, the exceptant might make a distinct motion that he should be ordered to receive it.

Exceptions.

Reference back to Master to review his report upon additional evidence

It may be stated here, that, when it appears upon the hearing of the exceptions, that the excepting party did not lay a material piece of evidence before the Master, which he had then in his power, and that the error in the Master's report was owing to such omission, the Court will not direct the Master to review his report upon any other terms than the exceptant's giving up his deposit (*u*).

—only granted upon terms;

The rule which precludes the reading of any evidence which was not before the Master, also precludes the reading of any parts of a defendant's answer, which were not read in the Master's Office (*x*).

No part of answer read upon argument of exception which was not read before Master.

It may be mentioned, that if a Master improperly rejects evidence which has been tendered to him, it should form a specific subject of exception to his report.

It is to be observed, that it is not competent to the Court, upon exceptions, to make an order which is not quite consistent with the original decree; from the time of the pronunciation of the decree, all the subsequent proceedings should be consistent with it, and if, upon argument of exceptions, it appears, that the justice of the case cannot be got at without an alteration of the decree, it must be reheard (*y*).

No order upon exceptions inconsistent with decree.

If, upon argument, the exceptions are overruled, the overruling them has all the effect of confirming the [illegible]

Effect of over-[illegible]

(*t*) 3 Mad. 44.

(*u*) Hedges v. Cardonnell, 2 Atk. 408.

(*x*) Rands v. Pushman, 6 Sim. 46.

(*y*) Per Lord Eldon in Brown v. De Tastet, Jac. 293, vide etiam E. I. Company v. Keighley, 4 Mad. 16.

Exceptions.

Where cause has been set down for further directions.

and if the cause has been set down to be heard upon further directions, to come on at the same time with the hearing of the exceptions, the Court proceeds at once to hear the cause upon further directions (*z*). So also, if the exceptions, or any of them, are allowed, but it is not necessary to refer the report back to the Master to be reviewed, the hearing of the cause upon further directions may be proceeded with, in the same manner as if the exceptions had been overruled (*a*).

Allowance of,

If the allowance of the exceptions, or any of them, renders it necessary to refer it back to the Master, an order is made referring it back to the Master to review his report, and the reservation of further directions and of the costs of the suit is continued until after the Master shall have made his report (*b*).

Deposit and costs.

The same rules which have already been laid down with regard to the deposit on and the costs of exceptions to Master's reports upon the insufficiency of answers, apply to the deposit on and costs of exceptions to the reports of Masters in general (*c*); and it may be mentioned, that where there are several parties appearing by different Solicitors, and each takes exceptions to the report, and the exceptions are allowed, the costs of all the excepting parties will in general be given to them, although the exceptions are in each case the same (*cc*). It should be recollected, that if the costs of exceptions to a report are not ordered to be costs in the cause, they cannot be allowed as such (*d*).

Adjournment of exceptions to allow Master to supply defect in report,

It may be mentioned, in this place, that sometimes, upon the argument of exceptions, the Court will think it right, before it comes to a decision upon the subject matter of the exception, to send it back to the Master to supply some defect in his report (*e*), or to make inquiry into some facts which may be necessary to enable the Court to come to a proper conclusion; in such cases, the Court usually adjourns the consideration of the exceptions, or of the particular exception in question, till after the Master shall have made the supplemental report.

(*z*) 2 Smith, 379.
(*a*) Ibid.
(*b*) Ibid.
(*c*) Ante, p. 333; as to the costs of persons excepting, who seek to establish claims, but are not parties to the suit, vide ante, p. 869.
(*cc*) Trezevant v. Fraser, MSS. 11 Jan. 1836.
(*d*) 2 Smith, 383.
(*e*) Vide Exparte Charter, 2 Cox. 168.

So, also, when the subject matter of the exception is a fact depending upon conflicting evidence, the Court will frequently, before it decides upon the exception, direct an issue at law to try the disputed fact, reserving the decision upon the exception till after the trial (*f*). In all such cases, the course of the Court is to postpone the consideration of the disposal of the deposit paid, upon filing the exceptions, and of the costs till the ultimate decision upon the exception.

Review. —or to allow the trial of an issue.

Review of Report.

Although the usual course by which a review of a Master's report is to be procured, is by taking exceptions to it, there are many cases in which the Court will direct the Master to review his report without requiring exceptions to be taken; or, if they are taken, will direct it to be reviewed upon grounds independent of those laid by the exceptions; and sometimes, as we have seen, the Court will direct a Master to review his report, in order to afford a party an opportunity for taking in objections to the draft, as a foundation for exceptions (*g*).

In what cases.

Where report has been excepted to.

A reference back to the Master, to review a report which has not been excepted to, may be made upon the hearing for further directions: and is frequently so made when the Court is not satisfied with the Master's finding, as where the Master has not found sufficient facts for the Court to found its judgment upon (*h*). So, also, if the Master has exceeded his authority, it will either direct him to review his report or take no notice of his finding.

Where report not excepted to.

We have seen before, that, where the report is the consequence of an order pronounced upon petition, or is upon the taxation of costs, the Court will, if the objections to the report are not apparent upon the face of it, entertain a petition to refer it to the Master to review his report (*i*).

Where report is founded upon order on petition;

(*f*) Wilson v. Metcalfe, 3 Mad. 45; vide etiam Gregg v. Taylor, 4 Russ. 279.

(*g*) Vallence v. Weldon, 1 Dick. 290; ante, p. 954.

(*h*) Turner v. Turner, 1 Dick. 313; 1 Swanst, 156 n. S. C.

(*i*) Ante, p. 941.

Review of Report. —upon motion.

In some cases, also, the Court will direct a review of the Master's report, upon application by motion; thus where there has been some omission or error in the report, which would prevent the matter being properly raised by exceptions, the Court has, upon motion, ordered the Master to review his report; as where, upon a reference of an examination for impertinence, the Master certified, generally, that the examination was impertinent, the Vice-Chancellor, on motion, referred it back to the Master to review his certificate, and state in what respects he considered the same impertinent (*k*).

After exceptions disposed of.

And, even where exceptions to the report have been heard and disposed of, the Court has, at the instance of a vendor, directed the Master to review his report, in order to give him an opportunity of completing his title (*l*). The Court has, also, as we have seen (*m*), referred a report, as to title, back to the Master to be reviewed, upon application, by motion, even after the report has been confirmed.

After confirmation.

In general, however, the Court is very cautious in admitting applications to review a Master's report after it has been confirmed; and it is only in cases of fraud, surprise, or mistake, that it will be permitted (*n*); and, even then, it will not be allowed unless a very strong case is made (*o*). And, it seems, that it is not competent to the Lord Chancellor to order the Master to review a report confirmed and followed by a decree of the Master of the Rolls, containing consequential directions, whilst that decree stands (*p*). The proper course, in such case, would be to have the cause reheard; but, even then, the Court will not permit the report to be even discussed, unless a very strong case is made out to induce the Court to allow it (*q*).

Cannot be allowed after decree on further directions.

(*k*) Anon. 3 Mad. 246.

(*l*) As to the cases in which the Court will send it back to the Master to review his report as to a title, vide ante, p. 874.

(*m*) Ibid.

(*n*) Drought v. Redford, 1 Moll. 573.

(*o*) Turner v. Turner, 1 Jac. & W. 39.

(*p*) Turner v. Turner, 1 Swanst. 154.

(*q*) Turner v. Turner, 1 Jac. & W. 42.

Amendment of Report.

Amendment of.

Where errors are apparent on face of it.

After enrolment,

It is to be noticed, that the proper course for correcting errors or supplying deficiencies in a report which has been confirmed, is by Bill of review, yet errors, apparent in the schedules, have been corrected, even after inrolment, on a summary application (*r*); thus where, in taking an account in the Master's Office, a mistake was made in the casting up of the schedules, and, upon the cause coming on upon further directions, the defendant was decreed to pay a sum, appearing by the schedules so cast up, to be due from him, and the plaintiff enrolled the decree, after which the mistake was discovered, Lord Eldon, upon an application to correct the error, said, that all errors apparent on the face of the schedules might be corrected, even after inrolment, but that there could be no correction except of such apparent errors. His lordship accordingly permitted the mistakes in the schedule, which were apparent, to be corrected, but refused a subsequent application, by the plaintiff, in the same case, to have some further sums, which he claimed, inserted in the schedules (*s*).

but only where errors are apparent.

(*r*) Weston v. Haggerston, Coop. 134; ante, p. 689.

(*s*) Ibid. 136.

CHAP. XXVI.

Of Further Directions.

Hearing upon further directions.

When a decree is interlocutory, and the consideration of further directions has been reserved until after the trial of an issue, &c., or until the Master shall have made his report, it is necessary, in order that a complete termination should be put to the suit, and that it should be wound up in all its parts, that it should be set down again to be heard for "further directions," which process must be repeated as often as any further directions are reserved by the last decree pronounced (*a*).

May be repeated as often as necessary.

Not set down before the report.

Where the consideration of further directions has been reserved by a decree till after the Master has made his report, the Court will not allow a case to be set down for further directions before a report has been made, even though it is found that the reference to the Master has become useless; thus where a decree directed an issue, and also directed an inquiry before a Master, and reserved the consideration of further directions until after the trial, and, after the report, the Court would not permit the cause to be set down upon the further directions without a report from the Master (*b*). The proper course, in such a case, would have been to have obtained a variation in the decree by rehearing (*c*).

even though reference is unnecessary,

but cause should be reheard.

After reservation of, Court will not interfere in a summary way.

The Court also refuses, in general, to interfere after a reservation of further directions in a summary way (*d*), unless liberty has been given to the parties, by the decree, to apply to

(*a*) Ante, p. 638. Where the consideration of costs is reserved as well as of further directions, the cause must also be set down 'upon the matter of costs.

(*b*) Dixon v. Olmius, 1 Ves. J. 153.

(*c*) Ibid.; perhaps the necessity of a rehearing might have been obviated by going before the Master under the decree and then waiving the inquiry.

(*d*) Cooke v. Gwyn, 3 Atk. 689.

the Court, as they may be advised (*z*), which, however, is very seldom done where the decree reserves the consideration of further directions.

In what cases.

But although the Court will not, after such a reservation, entertain a summary application relating to the general matters of the suit, it will, it seems, entertain applications for collateral matters, such as the appointment of a Receiver (*a*). The Court will also, upon consent, permit a Bill to be dismissed, without requiring the cause to be set down on further directions (*b*).

—unless upon collateral matters.

or to dismiss Bill by consent.

It is to be noticed, that it is only where further directions are reserved, by a decree or order, that it is required to set the cause down for hearing for such further directions; where a decretal order is made upon motion, such as a reference to a Master in an interpleading suit to inquire into the title, the Court will proceed upon the report on motion (*c*). Thus, in *Walters* v. *Pyman* (*d*), where, upon a reference of this description, the Master reported against the vendor's title, the Court, upon motion dismissed his Bill with costs. So in *Shore* v. *Collett* (*e*), where the Master reported in favour of the vendor's title, and exceptions were taken to the report, which were overruled, the Court entertained a motion that the purchaser might pay in the residue of his purchase money and interest. So after a decretal order, made on motion, for an account of the incumbrances on the estate, and to settle their priorities, an order for further directions and costs appears to have been made on petition (*f*).

Where decretal order is made on motion, cause need not be set down on further directions.

Further directions upon a separate report, are, as we have stated, generally given, upon petition, after the confirmation of the report (*g*), and so are all such further directions as are necessary upon a report made by the Master, upon orders obtained

Nor upon separate report,

nor where report is upon order made on petition.

(*z*) Vide ante, p. 611.

(*a*) Cooke v. Gwyn, ubi supra.

(*b*) Anon. 11 Ves. 169.

(*c*) Brooke v Clarke, 1 Swanst. 550.

(*d*) 19 Ves. 351.

(*e*) Cooper, 234.

(*f*) White v. Bishop of Peterborough; Rolls, 20 Dec. 1821, cited Seton on Decrees, 36. It is to be remarked, with reference to the above cases, as well as in cases of reference under the New Orders of the 9th of May, 1839, the orders do not, in general, contain any reservation of further directions

(*g*) Van Kamp v. Bell, 3 Mad. 430.

What may be ordered upon.

by petition, and which, as we have seen, are not confirmed by motion. In such cases, the petition for confirmation of the report generally embraces a prayer for the consequent directions (*g*).

What may be ordered upon further directions.

At the hearing, upon further directions, the Court will make such further order in the cause, as, upon reading the Master's report, appears to be consistent with the justice of the case as it stands upon the decree and report; unless it is dissatisfied with the manner in which the Master has executed the duties imposed upon him by the decree, in which case it will, as we have seen, send it back to the Master to review his report, or such part of it as the Court sees reason to be dissatisfied with (*h*). The Court, however, will not, as we have already stated (*i*), send it back to the Master to review his report, for the purpose of deducing consequences from the facts which he has stated in his report, but will itself draw the conclusions from the facts stated (*k*), as it will where the Master has drawn conclusions from the facts he has stated, which conclusions, but not the facts, are considered erroneous (*l*).

Reference back to Master to review.

Declaration of rights of parties.

In general, if the case is such as will admit of it, the Court will, upon the first hearing for further directions, make a final decree; and, when the reference to the Master has been merely to make preliminary inquiries, it will, when the case comes before it upon the report, declare the rights of the parties in the matters in question. If the declaration of the Court, or the result of the former inquiries, render any further reference to the Master necessary, the Court will take this occasion to make such further reference, reserving again the consideration of the further directions until after the Master shall have made his further report, and this, as we have seen, it will repeat as often as it may appear to be necessary.

Further reference to the Master.

No order made upon further directions where point raised upon pleadings but not in decree.

It is to be remarked, that, where a question has been raised upon the pleadings, but no direction or reservation of it has

(*g*) Ante, p. 946

(*h*) Ante, p. 952.

(*i*) Ibid.

(*k*) Bick v. Motly, 2 M. & K. 312.

(*l*) Adams v. Claxton, 6 Ves. 555; ante, p. 952.

been given with respect to it by the decree, the Court will not take it into consideration upon further directions: thus where, in a suit for the specific performance of an agreement for the sale of a copyhold estate, the defendant insisted by his answer that he was not bound to perform his contract, unless it could be shewn that the copyholders of the manor were entitled to dig marl and brick earth on the lands holden by them, and the original decree merely directed the usual reference as to title, the Court on the hearing upon further directions, refused to direct a reference to the Master, to inquire whether the copyholders of the manor were entitled to dig marl and brick earth, &c., (although a petition, praying that it would do so, had been presented, and ordered to come on with the further directions,) upon the ground that, as the point was raised by the answer, if the Court had thought it necessary to inquire into the fact, a direction to that effect would have been contained in the original decree, and that, to grant the prayer of the petition, would be to alter, entirely, the decree made at the original hearing, which it is not competent for the Court to do at the hearing on further directions (*l*).

What may be ordered upon.

even though a petition be presented.

In fact, the Court will not alter a decree in the minutest particular without a rehearing (*m*), unless in the case of an information relating to a charity, in which case the Court will correct an omission of the original decree upon further directions (*n*).

Original decree will not be altered.

It seems, formerly, to have been considered that no direction could be given at a hearing upon further directions, for the computation of interest, where the question of interest had not been reserved by the original decree. In *Ryves* v. *Coleman* (*o*), it was said, by Lord Hardwicke, that, generally, no interest could be allowed where it was not ordered or reserved by the decree; but that, notwithstanding there was no particular reservation of interest by a decree, yet there was a discretionary power in the Court to allow interest upon special circum-

Computation of interest will be decreed although not reserved.

(*l*) Le Grand v. Whitehead, 1 Russ. 309.

(*m*) Lord Shipbrooke v. Lord Hinchinbrooke, 13 Ves. 387-394.

(*n*) Attorney-General v. Whiteley, 11 Ves. 241.

(*o*) 2 Atk. 440.

What may be ordered upon.

stances. In *Champ* v. *Mood*(*p*), his lordship also observed, that the reservation of further directions in general had not been taken to reserve interest, and that interest ought to be expressly directed by the decree to be reserved; but he admitted that there might be a case where, it having been pointed out in the cause, the Court would take interest to be reserved on such general directions; that, after a direction of a trial at law, reservation of general directions would be taken to include costs, interest, and every thing; but he held that in the common case of a reference to a Master, it was taken to be otherwise: and, in *Hearle* v. *Greenbank* (*q*), interest not having been reserved by the decree, Lord Northington said he could not order it on further directions, but recommended the plaintiff to rehear the cause, merely to introduce a reservation of interest. In a previous case, however, *Goodyere* v. *Lake*(*r*), Lord Hardwicke had, according to the report in Ambler, held it to be clear, that, under the general reservation of further directions, the Court might give interest, though not reserved by the decree, and referred to a case of *The Hudson's Bay Company* v. *Sir Stephen Evans*, in which it was done; and, in *Sammes* v. *Rickman* (*s*), and *Margarum* v. *Sandiford*, there cited, it was so held accordingly. And, in *Creuze* v. *Hunter* (*t*), Lord Roslyn said, he had thought that if interest was not given by the decree, or reserved, it was matter of rehearing, and that, in strictness, this was the rule, but that, if the point was made upon the hearing for further directions, he saw no objection to its being then given if the case would warrant it; and he expressed himself satisfied with the authority of *Margarum* v. *Sandiford* that it might be so (*u*). The practice, therefore, of directing the computation of interest, upon further directions, where it has not been reserved by the original decree, is now considered as established; and not only will the computation of simple interest be so directed, but, where the Court finding large sums of money in the hands of an agent, receiver,

(*p*) 2 Ves. 474.
(*q*) 1 Dick. 370.
(*r*) Amb. 584; 1 West, 490. S. C.
(*s*) 2 Ves. J. 36.
(*t*) 4 Bro. C. C. 318; 2 Ves. J. 164. S. C.
(*u*) Vide etiam Maghee v. Mahon, 1 Moll. 147.

trustee, or personal representative, it will direct the Master to ascertain the balance from time to time in the hands of the accounting party, and to compute interest on them (*x*). And the Court has even gone the length, on further directions, of charging an accounting party with interest on the balance in his hands, not only where there was no reservation of the question of interest by the original decree, but even where the original Bill did not pray that they might be so charged.

What may be Ordered upon.

Where not prayed by the Bill.

This was done in the case of executors, in *Turner* v. *Turner* (*y*); and, in *Pearse* v. *Green* (*z*), where an agent appeared, by the Master's report, to have had large sums of money in hand, the Master of the Rolls referred it back to the Master to ascertain the balances in the agent's hands, and to compute interest upon them. It is to be observed, that, in the above cited case of *Turner* v. *Turner*, the direction to compute interest, notwithstanding there was none prayed by the Bill, was founded on the circumstance that, at the time the Bill was filed, there did not appear to have been any money in the hands of the executors, and that the balances arose subsequently to the institution of the suit, and, therefore, could not be adverted to in the original Bill; and the same ground appears to have furnished the foundation of the decree in *Wilson* v. *Metcalfe* (*a*); in that case, the Bill originally prayed the redemption of a mortgage of an estate of which the mortgagees were in possession at the time it was filed, the value of the estate, (which, since the mortgage, had been greatly augmented by allotments under an Enclosure Act,) was not, at that time, known, and it was supposed that there would be a balance found due to the mortgagees; consequently the Bill did not pray an interest against them. It appeared, however, upon the Master's report, that the whole of the principal money and interest due on the mortgage had been paid off before the suit was instituted, and, therefore, that there was a large balance due from the mortgagees to the mortgagors; under these circumstances,

In the case of an executor or agent having balance in his hand;

in the case of a mortgagee in possession over-paid.

(*x*) Pearse v. Green, 1 Jac. & W. 135.

(*y*) 1 Jac. & W. 43.

(*z*) Ubi supra vide etiam Good v. Blewit, there cited.

(*a*) 1 Russ. 530.

What may be done upon.

when the cause came on, for further directions, upon the Master's report, the Court directed rests to be made, and interest to be computed on the balances from time to time in the hands of the mortgagees.

Where case for interest is made by the Bill.

From the above cases it might be inferred, that it is in those cases only, in which the circumstances were such, at the time of filing the Bill, that a claim for interest did not or could not be known to exist, that the Court will, upon further directions, make an order to compute interest upon balances, although there is no prayer for interest in the Bill; this, however, does not appear to be the case, as, both in *Pearse* v. *Green* (*c*), and in *Good* v. *Blewitt*, there cited, the Bills were filed for the express purpose of enforcing an account and payment of balances, and decrees for interest were made, although no interest appears to have been prayed, nor was the consideration of it reserved.

But not upon petition to come on with further directions.

It is to be remarked, that it is only in cases where it appears, from the Master's report, that there is an equitable right to charge an accounting party with interest, (as where an agent, or trustee, or personal representative, has, for a long time, had a considerable sum of money in his hands, belonging to the parties in the suit,) that the Court will direct a computation of interest when it has not been reserved by the original decree; where this does not appear by the report, the Court has no foundation upon which to make such a direction, and, it seems, that it will not entertain a petition for the mere purpose of bringing before the Court facts which do not otherwise appear, upon which to ground a direction to the Master to inquire into balances and charge interest (*d*).

(*c*) 1 Jac. & W. 135.

(*d*) Parnell v. Price, 14 Ves. 502 (first edition). The author thinks it right to call the reader's attention to a very material discrepancy between the report of Parnell v. Price in the original and second editions of Mr. Vesey's Reports. In the report, as it appears in the original edition, it is stated that 'the directions were given for interest and costs upon the Master's report, and that the inquiry prayed by the petition was *refused*;' whereas, in the second edition, it stands thus. 'The directions were given for interest and costs upon the Master's report, and the inquiry prayed by the petition was *granted*.' In the first edition, also, the following passage occurs, which is wholly omitted in the second, viz. 'The *Lord Chancellor* and the *Registrar* (Mr. Croft) being applied to by his Lordship, said, there was no instance of such a petition;' and this appears to be in conformity with the decisions in Creuze v. Hunter, 2 Ves. J. 157; and 4 Bro. C. C. 157, S. C.; and Bruere v. Pemberton, 12 Ves. 387; vide etiam Le Grand v. Whitehead, 1 Russ. 309 ante, p. 966.

What may be done upon [illegible]

In what cases defendant will be charged for wilful default.

And not only will the Court, in cases where upon the decree, and the report under it, a proper ground appears for giving interest, direct the computation of interest on further directions, though the question of interest has not been reserved by the original decree; but it will, if the report makes a new case against the defendant for charging him with sums which, but for his wilful default he might have received, make a direction for so charging him on further directions, even where it was prayed by the Bill and refused at the hearing from deficiency of proof (*e*).

Receiver appointed on further directions, though refused at hearing.

So, although a receiver has been refused upon the hearing of the cause, yet if, upon the report, a new state of facts appears, *e. g.*, a balance in the hands of the defendant, the Court will entertain a renewed application for a receiver (*f*)

Taxation of costs on further directions ordered on the same principle as former taxations.

The Court, however, will not, (even though a new state of circumstances appears by the Master's report, shewing that if the facts, as they are stated upon the report, had been before the Court at the time when it pronounced the decree, it would not have given the directions contained in the original decree), make any order, upon further directions, which will have the effect of varying or impugning the original decree, and therefore, where a prior decree had ordered the costs of a mortgagee to be taxed, it was held, upon further directions, that he would be entitled to be paid those costs, although it appeared, by the report, that he was paid off before the commencement of the suit, and that he had set up an improper defence (*g*)

Secus where former taxation was directed upon petition by consent

Upon the same ground, when costs of a party have, at the hearing, been ordered to be taxed as between Solicitor and client, the Court will, at the hearing upon further directions, direct the subsequent costs of the same party to be taxed upon the same principle. It will not, however, consider itself bound by a previous direction to tax costs, as between Solicitor and client, made upon petition and by consent, where, upon further directions, it appears that there is no case to warrant such a mode of taxation (*h*).

(*e*) Franklin v. Beamish, 2 Moll 383.

(*f*) Attorney-General v The Mayor of Galway, 1 Moll. 95.

(*g*) Wilson v Metcalfe, 1 Russ. 530

(*h*) Trezevant v. Fraser, Rolls. Aug. 1839.

What may be done upon.

No objection can be raised on further directions which might have been taken at the hearing

As the Court will not allow any variation to be made in the original decree upon the hearing of the cause for further directions, so it will refuse to entertain an objection to it on a ground which might have been made at the original hearing; thus, where a suit was instituted by a Solicitor, for the payment of his bill of costs, and it appeared, by the answer, that the bill of costs had not been signed conformably to the Act of Parliament, whereupon the Bill was duly signed, and the fact of the signature put in issue by a supplemental Bill, and a decree was made at the Rolls, referring it to the Master to tax the Bill, &c.—Upon the case coming on before Lord Brougham, on appeal from the order made by the Master of the Rolls on further directions, his Lordship held, that the defect in the suit, as originally instituted, arising from the bill of costs not having been duly signed, was not cured by the supplemental Bill, and that the Bill ought, at the original hearing, to have been dismissed with costs; but as that had not been done, and the decree had not been appealed from, it was not open to the defendant to take the objection upon further directions (*h*).

In what Court set down.

Formerly it was not necessary that a cause should be set down, for hearing upon further directions, before the Court in which the decree was pronounced (*i*), but, by the recent Orders (*k*), every cause requiring to be heard for further directions, or on the equity reserved, and in which the Master's report has been or shall be made, or a trial at law has been or shall be had, or the certificate of a Court of Common Law has been or shall be obtained, in pursuance of a decree or order pronounced by the Lord Chancellor or Vice-Chancellor, shall be set down to be heard before the Lord Chancellor, and shall not, without special order of the Lord Chancellor be set down to be heard by the Master of the Rolls; and, by the same Orders (*l*), all and every cause requiring to be heard for further directions, or on the equity reserved, in

(*h*) Pritchard v. Draper, 1 R. & M. 191.

(*i*) Pemberton v. Pemberton, 11 Ves. 53.

(*k*) Ord. 5 May, 1837, VI, 3.

(*l*) Ib. Ord. X. 3.

which the Master's report, &c., has been made, &c., in pursuance of a decree or order pronounced by the Master of the Rolls, shall be set down to be heard before the Master of the Rolls, and shall not, otherwise than for the purpose of rehearing, be set down to be heard before the Lord Chancellor.

Setting Down and Hearing.

By what party.

Any party may set the cause down for further directions, it is most usually, however, set down by the plaintiff.

How set down.

In order to have the cause set down for further directions, the plaintiff or other party setting it down, must present a petition, as of course, to the Lord Chancellor or Master of the Rolls, as the case may be, praying that the cause may be set down. If exceptions have been taken to the report, the petition may also pray that the cause may be heard at the same time as the exceptions. With the petition should be left a copy of the decree and report, and, when it is answered, the order should be drawn up and served upon the Clerks in Court, for all the parties (*m*), and an affidavit of such service should be sworn by the party serving the order, an office copy of which should be procured to use in case any of the parties should not appear (*n*). If there has been a sale of the estates, and the purchase money in Court is to be distributed, the plaintiff's Solicitor should serve the purchaser with a notice that the cause is coming on for further directions, and that the purchase money will be disposed of under the direction of the Court (*o*). So, also, if any person has obtained what is ordinarily termed a stop order, *i. e*, an order that a fund in Court or some part of it should not be paid out, without notice to the individual obtaining the order, a similar notice should be served upon the person by whom the order was procured.

Where money is ordered not to be paid out without notice to a purchaser, &c.

Where exceptions have been taken

If exceptions have been taken to the Master's report, and have been set down at the same time with the further directions (*oo*), they must be heard and disposed of before the cause is heard upon the further directions.

Proceeding at hearing.

The course of proceeding upon the hearing of a cause upon further directions, is much the same as that pursued upon the original hearing, except that the pleadings are not opened,

(*m*) 2 Harr. Ed. Newl. 588.
(*n*) Ibid.
(*o*) 2 Smith 399.
(*oo*) Ante, p. 958.

Hearing.

No decree *nisi* upon default.

nor are any proofs read, but those which were read before the Master. If default is made by any party in appearing, upon the production of an affidavit of service, an absolute order will be pronounced, and not an order *nisi*, as upon the original hearing (*p*).

Creditor may appear at, without order.

It may be mentioned, that a creditor whose claim has been admitted by the Master, has a right to appear upon the hearing of the cause for further directions to protect his own interest, and that he may do so without presenting a petition for liberty to appear, provided he desires to take advantage of nothing but what appears in the report (*q*).

In what cases petition may come on with; To carry out directions in the original decree.

It has been before stated (*r*), that, upon a hearing for further directions, the Court will not alter, or add to, the original decree, nor will it permit facts to be brought before it upon petition, to come on at the same time with the cause for further directions, in order to ground upon them a direction not warranted by the original decree. The Court will, however, at the hearing for further directions, entertain a petition for the purpose of carrying out the directions of the original decree, where circumstances have arisen which have rendered it necessary to obtain auxiliary directions, in order to fulfil the objects of the decree. Thus, where a decree had directed an account of the personal estate of an intestate, received by the administrator, and afterwards an arrangement was entered into, between the administrator, who was also the heir at law of the intestate, and the other next of kin, the effect of which was, that the rents of certain real estates, which the intestate had contracted to sell in his lifetime, but which descended upon the heir at law, in consequence of the contract not having been completed, should be treated as part of the personal estate of the intestate, and accounted for as such in the cause—the Master of the Rolls, Lord Langdale, made an order upon a petition, which came on before him at the same time with the cause for further directions, for a reference to the Master, to take an account of the rents in question as part of the personal estate (*rr*). So, also, if any new facts have oc-

(*p*) 2 Smith. 400.

(*q*) Young v. Everest, 1 R. & M. 426.

(*r*) Ante, p. 967.

(*rr*) Trezevant v. Fraser, MS. Rolls, 13th Jan. 1840.

curred since the original decree, which have altered the situation of the parties, or have affected their rights in the subject matter, and which have not been brought before the Court by a supplemental suit, these facts may be stated, upon a petition, which may be ordered to come on for hearing at the same time with the cause for further directions. Thus if a tenant for life of the fund in Court has died since the decree, and the fund has become distributable amongst those in remainder, a petition may be presented to the Court stating the facts of the death of the tenant for life, and praying the Court to make distribution amongst the parties who have become entitled upon that event. So also, if, after the Master has made his report, a person entitled to a debt or legacy out of the fund in the suit has died, his personal representative may present a petition praying that the debt or legacy belonging to the deceased party may be paid to him. In like manner, if, pending the suit, a party to it has assigned his interest in the fund, either absolutely or by way of mortgage, the assignee may petition the Court, at the same time the cause comes on upon further directions, that he may have the benefit of his assignment, and that payment may be made to him instead of the assignor. In all such cases, if the facts which form the ground of the application are not admitted by all the parties interested, or if all or any of the parties interested are not competent to make an admission, they must be verified by affidavit; and it is to be recollected, that, where a person applies, in the character of personal representative of a deceased party, by petition of this nature, for payment out of the fund in Court, he must have been constituted such representative, either by the Consistory Court of the Bishop of London, or by the Prerogative Court of the Archbishop of Canterbury (s).

Hearing.

—upon death of tenant for life.

—or of legatee,

or assignment of interest by party.

Affidavit in support of, where necessary.

It may be mentioned, with reference to this subject, that where money is reported due to a married woman, and the husband is desirous of obtaining payment of it, he should, if it be above £200, apply for payment to himself by petition, to come on for hearing at the same time with the cause upon

Direction for payment, in case of a married woman.

(s) Vide ante, vol. 1, p. 417

Hearing.

further directions, at which time the wife, if in London, should also be present to be examined by the Court (*t*). If the wife be in the country, the petition should pray that a commission should be issued to take her examination in the country, when the Court will make an order, upon such petition, for a commission, which must be proceeded with in the manner before pointed out (*u*). If no application of this nature is made at the hearing of the further directions, the Court will not order payment of the wife's money, but will direct it to be carried over to the separate account of the husband and wife.

Order upon.

An order made upon further directions, is in fact a decree of the Court, and is drawn up, passed, entered, and enforced, in the manner pointed out in a preceding chapter.

(*t*) Ante, vol. I, p. 121. (*u*) Ibid.

END OF VOL. II.

INDEX.

The References to Vol. 1 *refer to the Index of that Volume.*

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END OF INDEX.

ERRATA.

Page

10, note (*a*), for " *Attorney General* v *Roud*[illegible] read " *Attorney-General* v *Pearson*."

126, last line for " *Agar* " read " *Ivrell* "

127, line 15, after " so that " insert " *Haman* v *Thames*."

150, note (*t*), for " *Bird* v. *Bird* " read " *Baker* v. *Bird* "

159, line 9, for " 2 & 3 W. 4, &c " read " 3 & 4 W. 4, &c."

229, *dele* note (*m*)

358, line 11, for " plaintiff " read " defendant "

361, line 11, for " defendants " read " plaintiffs "

374, lines 17 and 18, *dele* " within three weeks from the undertaking being given."

380, note (*o*), for " 7 Sim. 161," read " 3 M. & C. 168 "

472, fifth marginal note, for " Examination," read " Examiner "

551, line 7, after " lost " insert ") "

603, note (*i*), add " *Turner* v. *Hitchon*, 2 M. & C. 710 "

609, note (*o*), for " *Mogg* v. *Wall*," read " *Rigg* v. *Wall* "

659, marginal note, line 2, for " within," read " after "

675, second marginal note, line 2, for " used," read " removed "

893, fourth marginal note, line 2, for " amounts to," read " are under "

ibid. lines 3 & 4, *dele* " and upwards "

G. DAVIDSON, Printer,
Serle's Place, London.